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MINORES AND MEDIOCRES IN THE GERMANIC TRIBAL LAWS

A DISSERTATION

SUBMITTED TO THE FACULTY
OF THE

GRADUATE SCHOOL OF ARTS AND LITERATURE

IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

(DEPARTMENT OF HISTORY)

BY

EDGAR HOLMES MCNEAL

COLUMBUS, OHIO
PRESS OF F. J. HEER
1905

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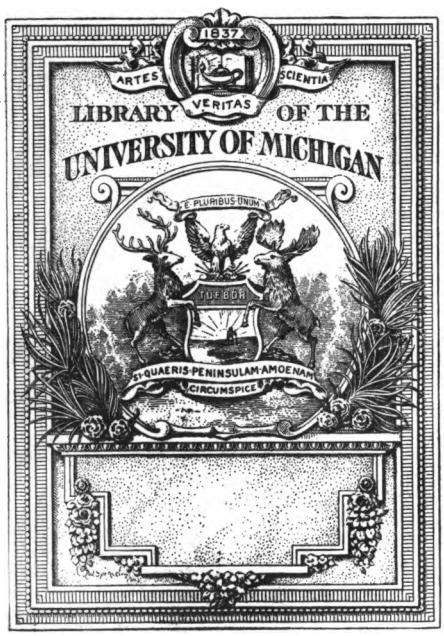

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MINORES AND MEDIOCRES IN THE GERMANIC TRIBAL LAWS

A Study of Classes of Freemen as Distinguished in the Laws of the Burgundian, Alemannian, Lombard, Visigothic, and Bavarian Tribes.

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INTRODUCTION.

The problem to be discussed in this study is the nature of certain classes appearing in some of the Germanic tribal kingdoms. The period of the Germanic invasions, when the northern frontier of the Roman Empire, from the mouth of the Rhine on the west to the mouth of the Danube on the east, was attacked and broken all along its extent by the successive assaults of the barbarian tribes, and when the western provinces of the empire and Italy itself were overrun by these hordes, was followed by the era of the tribal kingdoms, during which the tribes or confederations of tribes settled upon the land they had conquered and developed there into territorial states. During this period there came into existence upon what was formerly the territory of the Roman Empire the following Germanic kingdoms: The Frankish in northern Gaul and Germany, the Visigothic in southern Gaul and Spain, the Burgundian in southeastern Gaul, the Ostrogothic and then the Lombard in Italy, the Alemannian in southern Germany (the old *Agri Decumates*), the Bavarian in Noricum, the small kingdoms of the Angles, Saxons, and Jutes in England, and the Vandals in northern Africa.

In most of these cases the conquerors had existed independently as tribes or nations before the settlement, but the new situation tended to unify those which were aggregations of tribes and to hasten the development of all. One of the most striking evidences of this tendency is the early appearance of the written laws. Partly because of the exigencies of the new situation, most of all perhaps because of the influence of Roman written law, the new kingdoms proceeded to codify their primitive unwritten laws, in some cases preserving them almost pure, in others yielding in various degrees to the fascination which the Roman law and Roman institutions exercised upon them. It is in these codes that the statements occur which give rise to our problem.

In certain of these tribal laws the freemen appear to be divided into classes of which there are no evidences in the primitive social structure of the Germanic peoples. Thus in the Burgundian code there appear the minores, mediocres, and optimates; in the Alemannian, liberi or minoflidi, medii or mediani, and primi; in the Lom-

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bard, minimæ or exercitales, gasindii, and primi; in the Bavarian, minores as distinct from the rest of the freemen; in the Visigothic, inferiores and maiores.

The problems connected with the nature of these classes are not without importance for the history of the social evolution of the Middle Ages. These classes seem to represent the first stage in the transition from the primitive and simple Germanic society to the elaborate structure of the feudal system. And although not one of the five tribal kingdoms with whose laws we shall be occupied had an enduring existence, all of them being absorbed in the Frankish empire and their institutions merged in the main in the Frankish system from which mediæval feudalism directly developed, yet studied separately their institutions give a truer idea of the course of the development which the Germanic tribes underwent when subject to contact with the new conditions and with Roman institutions, than can be gained from a study of the dominant Frankish institutions alone.

This introduction will attempt to trace the general features of the social evolution of the German tribes from the period of the invasions to the feudal period. This will mean a consideration of the social conditions in their primitive form before the migrations, the results of the migration and settlement, and the development of feudalism in the Frankish state. This may seem to anticipate the conclusions to be reached in the study of the particular laws, but in fact the real problem will not be prejudiced, since this sketch can only give the general outlines. Moreover, it seems necessary to carry the outline beyond the period to which the laws properly belong, in order to place correctly the stage of development found in the individual instances.

The problems connected with the character of Germanic society before the invasions have been the subjects of much discussion and dispute, into which it is evident this sketch cannot enter. In regard to the main features, however, a certain amount of agreement has been reached. The basis for such conclusions has been found in the statements of the Roman writers, especially Cæsar and Tacitus, and in the traces of the early period which have survived in the Germanic codes.

The political unit of the primitive German constitution seems to have been the small tribe, the unit apparently meant by Cæsar

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and Tacitus when they speak of the civitas. Within the tribe the territorial divisions were the hundreds, which seem to have been the units of the judicial organization. Below the hundreds were the village communities, which may be called the social and economic units of the state.

Some of the tribes seem to have had a monarchical, some a republican form of government. Cæsar says (B. G., VI, 23) that the Germans were not ruled by kings in their ordinary relations: "In pace nullus est communis magistratus, sed principes regionum atque pagorum inter suos ius dicunt controversiasque minuunt;" while Tacitus distinguishes between those civitates which were ruled by kings and those governed simply by principes. The salient characteristic of the political system is to be found in the sets of free assemblies corresponding to the divisions of the tribe. The chief assembly was that of the civitas, the tribal or folk assembly. This was composed of the freemen of the tribe, and in it were discussed the important affairs of the tribe; here too were chosen the officers who were to administer justice to the divisions of the tribe. (Tacitus, Germ. 12: "Eliguntur in isdem conciliis et principes, qui iura per pagos vicosque reddunt.") These "principes" are evidently the heads of the hundreds, the presiding officers of the assemblies held in each hundred as the regular public courts; they appear in the laws as the Salic "thunginus aut centenarius," the Alemannian "centenarius," and the Anglo-Saxon "hundredes-ealdor." The procedure in these primitive courts has been the subject of much discussion, but it seems clear that the freemen of the hundred were supposed to attend the regular meetings and that they had a definite part in the proceedings. The assembly of the village community was made up probably of the heads of families of the village, and was concerned with such minor matters as might arise in the ordinary life of the village.[1]

[1] This statement rests upon the identification of the civitas, pagus, and vicus of Tacitus, respectively, with the small tribe (later county or shire), the hundred, and the village community. There are difficulties in the way of this interpretation, but none, it seems, that may not be explained by the failure of the Roman writers to understand thoroughly the unfamiliar institutions, or by the natural development of these institutions during the period from the time of Tacitus to that of the early laws. Certainly no other interpretation will agree so closely with the statements both of the Roman writers and of the later German sources.

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The whole structure of the primitive German society was based upon the freeman. The various assemblies were composed of the freemen of the tribe or the hundred or the village; the army was composed of the freemen of the folk able to bear arms; the rulers and officials, kings and principes, were elected by the freemen; the economic unit was the hide of the freeman, which was the ideally equal share of the land of the village community; in this respect the freeman is regarded as the head of the family and his portion is supposed to be based upon the needs of a family.

Along with this essentially democratic constitution there existed a distinctly aristocratic element. The laws or the traditions of nearly every Germanic tribe give evidence of the existence of a noble class. Saxon and Frisian sources speak of ædhilingi, ethelinga; the Anglo-Saxon eorl is evidently noble by birth; in the Bavarian code there are five noble families mentioned by name beside the ducal family of the Agilolfings; among the East Germans the kingship became hereditary in one family of each tribe, the Amals of the Ostrogoths, the Balts of the Visigoths, and the Astings of the Vandals; and Tacitus speaks of nobiles as a class common to the Germanic people. According to Tacitus it was from the nobles that the kings were chosen by those tribes that had that form of government (Germ. 7: Reges ex nobilitate, duces ex virtute sumunt), and noble birth was so highly regarded as to cause even noble youths to be chosen as principes to lead select bands of devoted warriors[2] (Germ. 13: insignis nobilitas aut magna patrum merita principis dignationem etiam adulescentulis adsignant). The advantageous position of the tribal noble was based upon the respect of the tribe for the family to which he belonged. The individual noble apparently had no legal claim to official rank, but merely a natural advantage over other candidates by reason of his descent — it is a privilege rather than a right.[3]

[2] Whether or not these principes were the same as the elected principes who were the regular officials of the hundred is still in dispute. Waitz (I, 244-256) regards them as the same; von Maurer (Adel, pp. 7-14) presents a good argument that they were quite distinct.

[3] So von Maurer, Adel, p. 4: "Verstehen wir unter 'Adel' einen Stand, der, nach aussen abgeschlossen, gewisse *Vorzuege* (nicht nothwendig *Vorrechte*) vor dem übrigen Volke geniesst und auf seine Nachkommen vererbt, so tritt uns ein solcher," etc.

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This is in outline the character of the primitive Germanic society. Even before the migrations certain changes had taken place, affecting chiefly the political aspect. The small tribes which have been considered as the political units of the primitive German constitution in many cases had ceased to have a separate existence and had united to form larger racial or tribal units, becoming the administrative divisions of the larger bodies; so in those cases the "Gaue" or counties of the new tribes tend to coincide with the old tribal units.[4]

Another important political change that had come about before the migrations was the development of the monarchy. This may be regarded as a phase of the amalgamation of which we have just spoken, or better as a result of the wars of the German tribes with one another and with the Romans of which that amalgamation was also a result. The invading tribes in every instance appear under the leadership of a king.[5]

The invasion of the Roman empire by the German tribes and their settlement within the empire brought about changes which affected intimately every phase of the primitive society. This may be noted first in regard to the monarchy. The prestige of a successful war, the possession by the monarch for a considerable length of

[4] This is shown by the survival of the names of some of the small tribes in the shire or county names of the West Saxons, Franks, and Alemannians. In regard to the West Saxons see Stubbs, Const. Hist., I, pp. 123, 124; in regard to the Franks, Waitz, D. VG., I, p. 202, n. 2, and Sohm, Altd. R. und GV., p. 12; in regard to the Alemannians, Zeuss, Die Deutschen, pp. 309, 310. The Burgundian, Lombard, and Gothic kingdoms seem to have developed from simple tribes; at least Tacitus and the other early Roman writers mention Burgundiones, Langobardi, and Gutones in the same category with Chamavi, Chatti, Chauci, Tencteri, Usipii, etc., which latter are known to have united to form the Frankish, Saxon, and Alemannian confederations. It may have a significance for this question that those tribes which apparently sprang from a single folk do not seem to have the territorial divisions into hundreds; for this may be due to the fact that what was once the hundred of the small tribe became the county of the tribal kingdom, supposing that the division into hundreds was common to all.

[5] Save perhaps in the case of the invasion of England. If we accept the traditional accounts in the Anglo-Saxon Chronicle, then Hengist and Horsa, Cerdic and Cynric, appear to be those principes who were wont to lead select bands of warriors upon adventurous expeditions in foreign lands when their own land was at peace.

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time of the extensive powers necessary for the conduct of such a war, the influence of Roman notions of government held by so large a part of the population of the new states — all must have operated to change the character of the German kingship. But perhaps most important of all was the possession of a new source of wealth and power in the extensive tracts of land which came into the hands of the king. Whatever form the invasion took: whether it was conducted by the tribe as Roman auxiliaries, under a king in the mocking guise of a Roman official, as in the case of the Visigoths under Wallia and the Ostrogoths under Theodoric; or was an open attack upon a Roman province, as the Lombard invasion of Italy; or was an occupation of unprotected territory as the Frankish occupation of northern Gaul, the result for the monarch was much the same; the extensive imperial domains within the territory ocupied by the tribe and probably also all unoccupied land left over after the tribe had settled, fell naturally to the king as the conqueror or as the successor to the emperor.[6] This put into the hands of the king a source of great power, power far more real than that which he possessed in the popular approval of the tribe or in his noble descent, power which was to show itself distinctly antagonistic, moreover, to the popular elements in the monarchy.

A result of this change in the character and position of the king was the creation of a royal administration. In general this consisted of two sets of officials, public and private. The transfer of public authority from the popularly elected officials to the officials appointed by the king was accomplished in different ways in the various tribal kingdoms. In the case of those tribes which were settled completely within the Roman Empire with the acquiescence, feigned or real, of the emperor (Burgundians, Visigoths, Ostrogoths) the Roman system of governing by centrally appointed ministers was taken over almost immediately. Among the other tribes

[6] Gaupp, Germanische Ansiedlungen, p. 185: "Dagegen ist es allerdings sehr wahrscheinlich, dass derselbe [the king], so wie ihm das abgeleitete imperium über die Römer allein zufiel, so auch in Betreff alles Landes, welches nicht in der Eigenschaft von Sortes in Germanische Hände überging, gewissermassen der Erbe des Römischen Kaisers wurde." Also p. 335: "Mit grösster Wahrscheinlichkeit lässt sich vermuthen, dass die Germanischen Könige überall das sehr bedeutende Vermögen der kaiserlichen Krone für sich in Besitz nahmen." So Waitz, II, 1, 308.

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the prototype of the later comes is found in an official of German origin. Even in the time of Tacitus the king of the small tribe received a share of the court fines. To secure this the king apparently had an official who would represent him in the hundred-courts. After the amalgamation of the small tribes to form the new tribe this official seems to have become the royal representative within each folk-county. As such his growth in power keeps even pace with the development of monarchical authority, until he becomes the chief judicial and executive official in the county.[7] In the Frankish, Alemannian, and West Saxon kingdoms the freemen are still represented by the elected hundred-man, but the authority of this official inevitably yields before the encroaching power of the comes.

The other set of royal officials were those who served the king in his private capacity. They were the officials of the royal court (the household of the king) and the managers of the royal domains (the private property of the king). With the decline of the democratic institutions the royal administration became the public administration, and the officials of the royal house became, so to speak, the heads of departments of the new state. The value of the royal lands led to the creation of a special set of officials for their management. These officials in general were assigned to divisions which followed the lines of the public administrative districts, in such a way that beside the count there was placed an official who had control of the royal lands within the county, while the whole system of the domain lands was under the control of one court officer.[8]

From the chief officials of both kinds the monarch made up his council, a body that was to play an important part in the develop-

[7] This development of the German official into the comes can be seen most plainly in the Frankish graf and the Anglo-Saxon gerefa. The change from graf to comes can be traced in the "grafio" of the Salic Law, the "grafio aut comes" of the earliest capitularies, and the "comes" of the later capitularies. The influence of the Roman conception of the comes civitatis upon the development of the Frankish official must of course be admitted.

[8] This dualism in royal officials appears most clearly in the Lombard dux and gastaldius, but apparently the same thing is to be found in the comes and domesticus of the Frank and Alemannian kingdoms. The ealdorman and the scir-gerefa of the English system do not present quite the same phenomenon, for the ealdorman is apparently the descendant of the former folk king, while the gerefa corresponds to the graf or comes, although in Latin documents he is called vicecomes.

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ment of the monarchy.[9] In the primitive constitution as described by Tacitus the elected principes formed a small body which discussed matters of minor importance,[10] but in the tribal kingdoms the royal council played an ever increasing rôle, and eventually entirely took the place of the tribal assembly.

Another powerful class that owed its favored position to the king and so may be reckoned among the supporters of the monarchy was made up of those who possessed large estates from the royal lands. This class of course would coincide very largely with the official class. The extensive domains which the king had acquired were used by him not only as a source of revenue, but as a means of rewarding those who deserved well of the monarchy. These grants were in the beginning, it would seem, gifts outright;[11] it was not until later that the great value of the royal possessions in creating a royal administration was fully appreciated and was developed into a system.

It is important also to consider the classes from which these supporters of the monarchy would be drawn. They would be, in general terms, those with whom the king was familiar and upon whose service he was depending at the moment when he came into possession of his new power. It is known that the king, like the princeps of Tacitus, had his own comitatus, his personal following, or bodyguard of warriors; men bound to him by a close personal tie, who fought under his leadership, sharing his dangers and his glory. It is to be expected that the king would choose from this body those who should serve him in his new position and those whom he would reward from his new possessions. The best instances of this are found in the Frankish "antrustiones," sprung,

[9] Cf. Lex Burg., Prima Const. A: coram positis *obtimatibus nostris* universa pensavimus; Lex Alam., XXIII: sicut dux aut *principes populi* iudicaverint; Chilperici Edictum, 561-584 (M. G. LL. folio, II, tom. I, p. 8): Pertractantes in Dei nomen *cum viris magnificentissimis obtimatibus vel antrustionibus* et omni populo nostro; compare also the English Witenagemot.

[10] Germ. 11: De minoribus rebus principes consultant, de maioribus omnes.

[11] Lex Burg., I. De libertate donandi patribus adtributa et muneribus regis; Lex Visig., V, 2. 2. De donationibus regis. In regard to the Franks see Waitz, D. VG., II, 1, pp. 308 ff; Roth, Beneficialwesen, pp. 203-246.

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it would seem, from the comitatus of the king,[12] and in the English gesithas,[13] but a similar development undoubtedly took place in most of the Germanic kingdoms. Still another class of persons near to the king was to be found in his half-free and unfree servants, especially those concerned with the management of his household. The king found here at his hand men trained in the service which he required. The fact that the great officials of the Merovingian court, maior domus, seniscalcus, mariscalcus, camerarius, all bear titles originally applied to unfree servants points to the servile origin of these important offices, while the "puer regis" who is a sacebaro in the Salic law and the "regius puer" who is a graf in the Ripuarian law are evidences of the employment of unfree persons in the public service.[14] It is not to be supposed of course that the comitatus and the household of the king furnished all the new officials of the monarchy. Increasing numbers of persons would recognize the advantages attendant upon employment in the royal service and would seek to enter that service, but it seems altogether probable that in the beginning the majority of the new officials were taken from those persons immediately surrounding the king.

The results of the invasions and the establishment of the tribal kingdoms should be noticed especially in their influence upon those elements of the primitive state which did not take part in the monarchical development. The influence upon the position of the tribal noble is evidenced by the fact that those laws which show this monarchical tendency most strongly contain no mention of a class that can be proved to be made up of nobles by birth. The appearance of the tribal nobles among the Saxons, Frisians, and Bavarians may be attributed to the remoteness of those peoples from Roman influence and their consequent tardiness in the line of monarchical development. In the other tribal kingdoms the tribal nobles may have entered the royal service and so have gained a compensating advantage for the loss of their former privileges, but if they did so it was as individuals and not as a class, and the privileges of

[12] In regard to the antrustiones see Waitz, II, 1, pp. 335–344; Coulanges, Les Origines du système féodal, ch. xiv, "La truste du roi"; Deloche, La trustis et l'antrustion royal sous les deux premières races.

[13] Stubbs, Const. Hist., I, pp. 138, 162, 170; Kemble, Saxons in England, I, p. 168.

[14] Lex Sal., LIV, 2; Lex Rib., LIII, 2.

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their new position depended upon royal favor, and not upon noble birth and the reverence of the tribe for their families. The old tribal nobles as a class tend to disappear in the new state and a new nobility of land and office depending upon the king comes to take their place.

The effect upon the freeman is a matter of the greatest importance for the subsequent development. It is in this connection especially that our problem occurs. The freeman has suffered a decided loss politically in the fact that the chief officials are now dependent upon the monarch. This loss in political importance, of course, varies in the different kingdoms, being most complete in the case of those states whose population is most largely Roman. In certain cases the old hundred-man still exists and apparently is still elected by the freemen of the hundred, although the chief authority is in the hands of the royal count. Such seems to be the case among the Franks and Alemannians. In the early Anglo-Saxon kingdoms the political importance of the freeman is still more completely preserved in the fact that the former popular head of the folk is in a measure succeeded by the ealdorman and the old folk-moot is continued in the shire-moot.[15] But in the Burgundian, Bavarian, and Visigothic kingdoms the local authority appears to be in the hands of the subordinate officials of the comes. The change in the economic situation is also of great importance. The existence of large estates in the hands of the king and his officials and friends, in comparison with which the alods of the freemen sank into insignificance, not only served to make the freemen appear as a distinctly lower class than the new landlords, but gave opportunity for the reduction of the freemen to a position of dependence upon their more powerful neighbors. This latter part of the process was a matter of slower development and does not become general until the later Merovingian period. In the early laws the contrast is apparent between the ordinary freeholds and the great estates, but the freemen in the mass appear to be independent.

The immediate results of the migrations and settlement may be summed up as follows: The tribal king has become a monarch,

[15] Stubbs, Const. Hist., I, p. 124: "[The shire] in some respects bore evidence of its previous existence as an independent unity. Its gemot was not only the scir-gemot but the folc-gemot also, the assembly of the people."

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the source of law and authority. A new class characterized by office and wealth has grown up about this monarch, consisting chiefly of two sorts of officials, both appointed by the king. This class is indebted to the king not only for political position, but for landed wealth as well. The former free institutions have been seriously impaired by the development of the monarchy and of monarchical institutions, the source of authority within the county being now the royal count. The tribal nobles as a class have in most cases disappeared. The freemen have lost in political importance by the creation of a royal administration dependent upon the king in place of the former officials elected in the tribal assembly, and in economic significance because of the existence of large estates completely overshadowing the ordinary freeholds. These results are in many cases embodied in the tribal laws. Indeed, there may be said to be a functional relation between the new situation and the promulgation of these laws, for the latter was due in some degree to the necessity felt by the king of defining the new relations and confirming the advantages he had gained.

The history of the period following the formation and establishment of the tribal kingdoms down to the appearance of the feudal states is the history of the Frankish kingdom and empire. One by one the small states, Alemannian, Visigothic, Burgundian, Bavarian, Lombard, and Saxon, disappear in the engrossing Frankish system. This history falls naturally under four topics: the Merovingian development, the organization of the empire of Charles the Great, the disintegration of the empire under the later Carolingians, and the emergence of the feudal states. But as we have already considered the course of the early development of the Franks as one of the tribal kingdoms, this study may begin with the later Frankish history, the period of the decline of the Merovingian house and state; that is, mainly the seventh and eighth centuries.

Just as the period of the tribal kingdoms was characterized by the development of the monarchy at the expense of free institutions, so the essential feature of the later Merovingian kingdom was the development of the landed noble at the expense of both monarch and freemen. These new nobles, who came into existence as the supporters and beneficiaries of the monarch, became in this period the menace of the monarchy. Evidences that this menace was recognized by the king are not entirely wanting, but the Mero-

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vingian monarchy had become by that time so weak in itself and so dependent upon this class that it was unable to check the development. A further and not less momentous effect of the growth of the new nobility was the decline of the freeman.

To trace in brief outline the general course of the development of this period is not an easy task. It may be possible, however, to bring some sort of order into the description by tracing separately the development of the different elements. The general tendencies of the period may be said to be the weakening of the royal authority, on the one hand, and the depression of the freemen, on the other, by the inordinate growth of a new class whose power depends upon the possession of office and landed wealth. The weakening of the monarch appears in the tendency of the public officials to become independent of the monarch, in the reassertion of tribal unity represented by the great dukes, and in the creation of estates in the hands of private persons from which the royal authority is excluded. Inasmuch as the royal administration was at the same time the public administration, the weakening of the royal authority meant in the main a corresponding lessening of the political importance of the freeman, since the monarch had taken the place of the former free institutions of self-government; but the depression of the freemen as a class is to be traced more particularly to economic causes.

The public administration of the later Frankish kingdom was a continuation of that which we have seen in use in the earlier tribal kingdom. The regular administrative district was the county within which the count exercised the chief civil and military authority.[16] The county was divided into hundreds, the regular judicial districts. The old head of the hundred still persists in the centenarius, who still to some extent represents the freemen of the hundred; but this official, while apparently not an underling of the count, is yet inferior to him in position and authority.[17]

During the later Merovingian period the royal officials show a tendency to become independent of the king. This develops

[16] Waitz, II, 2, 21-41; Sohm, Altdeutsche Reichs- und Gerichtsverfassung, sec. 7, "Der Graf"; Thonissen, L'Organization judiciaire de la Loi Salique, pp. 50-56.

[17] So Waitz, II, 2, 131 ff, Anm. "Ueber den Centenarius der Merovingischen Zeit"; the opposing view is held by Sohm, R. und GV., sec. 9, "Der Schultheiss."

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mainly in three ways: in the fixing of the count in the county, that is, the appointment, as counts, of men holding land within the county; in the tendency towards inheritance of office, and in the union in one person of the character of public official and territorial lord. This last feature may be reserved for fuller treatment when we consider the growth of immunity estates.

The first evidence of the fixing of the count in the county is found in the Edictum Chlotharii of the year 614 (M. G. LL. quarto, II, 1, pp. 20-23): 12. Et nullus iudex [= comes] in alia loca [= pagos] ordinetur; ut si aliquid mali de quibuslibet condicionibus perpetraverit, de suis propriis rebus exinde quod male abstolerit iuxta legis ordine debeat restaurare. The importance of the establishment of this as a principle is to be seen not only in the development of the count into a local official instead of one sent out from the court, but also in the fact that this practice fitted in with and furthered the other tendencies toward independence which we have mentioned. Thus the custom would grow up of naming the count from among the chief families in the county, which would tend to make the office hereditary and to connect it with the holding of great estates.

The weakening of the authority of the Frankish king by the development of dukedoms corresponding in part to the former independent tribes is characteristic of the later Merovingian kingdom.[18] This survival of the feeling of tribal unity within the empire is to be seen possibly in the lines of cleavage which come to be more or less fixed in the numerous divisions of the kingdom, and from which the districts of Neustria, Austrasia, Aquitaine, and Burgundy emerge. It may not be safe to assume that Neustria and Austrasia represent the old Salian and Ripuarian Franks, but Burgundy is certainly a continuation of the old kingdom of the Burgundians. The great dukedoms of Bavaria and Alemannia stand for the former Bavarian and Alemannian tribes. Towards the end of the Merovingian period the southwestern part of France appears as the dukedom of Aquitaine under duke Eudo, and this division may be regarded as representing the unity of the Gallo-Romanic peoples of which the population was so largely composed. These dukes are not to be confused with the official dukes who appear as the heads

[18] See especially Sickel, Das Wesen des Volksherzogthums, H. Z., 52, pp. 407-490.

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of groups of counties at various times and with varying districts and powers under the later Merovingians. Such an official origin may account for the development of the duke of Aquitaine, but it seems that the Bavarian and Alemannian dukes were the successors of the former kings of the independent tribes. In the eighth century they appear as practically independent rulers of the districts under them. This is shown very clearly in the Bavarian and Alemannian laws, in which the authority of the Frankish king has very little place.[19]

More important in the weakening of the royal authority than either the growing independence of the counts or the development of the tribal dukes was the creation of a landed aristocracy that tended to usurp royal functions. The germ of this development is to be found in the practice already mentioned, common to all the German tribal kingdoms, of rewarding the servants and supporters of the monarchy by gifts of land from the royal domains. We have said that in the tribal kingdoms this led to the formation of a class of landlords distinct from the ordinary freemen. Under the later Merovingians these landlords became more and more independent of royal authority. This was due largely to the internal wars which on the one hand led the kings to attempt to win supporters by gifts of lands and privileges, and on the other lessened the restraint which a strong monarchy might have imposed upon such a development. It has been conclusively demonstrated that the "benefice" held by feudal tenure belongs rather to the Carolingian period;[20] but it seems altogether probable that at the end of the Merovingian period gifts of land from the royal domains were approaching that form.

An element of the greatest importance in the tendency of such estates to become independent was the growing practice of granting immunity to the holders. The result of this practice upon the position of the freemen will be considered in a later paragraph; its effect upon the royal authority was to withdraw a large amount of territory and a large number of subjects from the public jurisdiction. Grants of immunity were originally given to ecclesiastical landlords, and their effect was to release the clerical estates from the jurisdiction of the local count and his subordinates and to subject

[19] See the sections on these laws below.

[20] This is particularly the work of Paul Roth, Beneficialwesen, 1850; Feudalität und Unterthanenverband, 1863.

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them to the direct control of the king. The public officials were expressly enjoined from entering such estates to try cases, to collect the fredus or any other public exaction.[21] These grants were originally given, it would seem, for the purpose of freeing the subordinate members of the ecclesiastical corporation from secular interference,[22] and were later extended to include all persons living upon and cultivating lands belonging to the organization. It soon became the practice, however, for the Merovingian kings to grant immunity to the estates of secular landlords as well. The purpose of these grants was in the beginning, as has been said, to protect their holders from the oppressive interference of public officials, and to make them dependent directly upon the king, but as the Merovingian kings became more and more helpless the result was to make such domains virtually independent of monarch and official alike. Thus the royal authority and the royal revenues both suffered by this development.

The result of this weakening of the royal authority and development of territorial lords upon the position of the freeman was of course very disastrous. The powerlessness of the king left the simple subject a prey to the public officials, the counts and their subordinates. The development of the royal administration had taken from the freemen the protection of the old institutions of self-government, but had replaced these in a measure by keeping control of the royal officials and preventing oppression. In the last days of the Merovingian rule this safeguard disappeared and the freemen were almost without defense. During this time many evidences are found of oppression of freeman by the counts, and evidences also of attempts of the monarch to prevent it,[23] apparently in vain.

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[21] M. G. DD. folio, I, pp. 30 f: . . . integram emunitatem concedimus, . . . ut nullus iudex publicus quolibet modo iudiciaria accinctus potestate in curtes ipsius monasterii . . . nec ad causas audiendum nec fideiussores tollendum nec freda exigendum . . . ingredi nec ullas paratas aut quaslibet redibutiones exactare praesumatur.

[22] M. G. DD. folio, I, pp. 16-18: "pro quiete servorum dei"; "sub quiete tranquillitatis Domino protegente ipsi monachi iuxta religionis normam perpetim valeant residere"; "quo facilius liceat monachis ipsius in dei nomine regulariter consistentibus rectam delegationem sub quiete per tempora possidere."

[23] See the instances cited by Coulanges, Les Origines, pp. 351–353.

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But it was in the creation of the independent domains that the freemen found their greatest danger. We have seen above that even in the tribal kingdoms the distinction between the great estates and the simple freeholds had become very marked. It was said then that herein lay the opportunity for the reduction of the freemen to a dependent position. This process of reduction is carried to a great length during the later Merovingian period. The dependent relation of the freemen to the territorial lord may be said to have come about in two ways: by the voluntary entrance of the freeman into the service of the lord, and by the former free land-owner becoming the tenant of the lord. This latter relation was again the result of two processes: on the one hand, the owner of the land gave it up to the lord and received it back or took other land of the lord on the terms of a fixed rental; on the other, landless freemen were established as cultivators upon the land of the lord.

The entrance of freemen into the service of a powerful official or wealthy landlord was a common element of the later Roman Empire. The process was known as "commendatio" and the relation of the lord to his followers was spoken of as "patrocinium." These terms are found in regard to the same phenomenon in Merovingian documents,[24] which suggests a Roman origin for the institution. It may be regarded, however, as a natural process, the development of which was aided by the presence of the Roman custom. Other terms for those in a relationship of independence, such as vassi, suscepti, amici, gasindi, are found frequently in the formulæ of the Merovingian period.[25] This process resulted, on the one hand, in furnishing the lord with a following of devoted retainers and a body of officials to be used in the management of his estates, and, on the other, in giving a protector and a means of subsistence to those who either were without land or preferred to exchange a precarious freedom for a safer and more profitable dependence.

The sinking of the free land-owner into the dependent tenant finds its true explanation in the economic stress of the later Mero-

[24] See Coulanges, Les Origines, ch. ix, "Le patronat et la 'commedatio' dans la société romaine," and ch. x, "Le patronage et la recommandation dans l'état franc."

[25] For a discussion of these terms and references to the documents see Waitz, II, 1, pp. 253-262; Roth, Benef., 156 ff (amici, suscepti), 367 ff (vassi). See also the discussion of the term gasindi, below, pp. 78 ff.

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vingian period. This period was characterized by a series of internal wars that devastated the whole kingdom. With scarcely an interval of peace there occurred one after the other the struggles of Siegbert and Chilperich, Fredegunda and Brunhilde, Theoderich II and Theodebert II. Such a period of continuous internal strife must inevitably result in the reign of club-law, in public disorder as disastrous for the weak and unprotected as it would be favorable for the strong and those possessed of the natural forces of wealth and personal retainers. The small freehold which under simpler conditions had sufficed for the support of a family, now in a more complex state of society and under the weight of heavy public burdens, resulting largely from the waste of the numerous wars, became inadequate to the needs of its owners. The need of a private protector at a time when all public guarantee of safety had practically disappeared, induced the simple freeman to seek to ally himself on what terms he could with some powerful official or wealthy lord. Yielding to this double pressure, the ordinary freemen in considerable numbers appear to have surrendered their holdings to a nighboring lord, either to receive them back again "ad beneficium" or to take other lands of the lord's domain.[26] In this way the lord won a hold within the neighboring village community, and sometimes succeeded in reducing a whole village to a dependency of his estate.[27] It is probable also that such surrender of his land by the freeman was not always voluntary; among instances of oppression of their subjects by the public officials there is frequent mention of "usurping the land of another."[28]

Another class of freemen who became tenants of the lords was made up of those who possessed no land of their own. The claim of the king to the unoccupied land had taken away from the village community the opportunity of expansion so necessary to the system in providing a means for the accommodation of the increasing pop-

[26] Coulanges, Les Origines, ch. vii, 2, "Du 'beneficium' dans l'époque merovingienne."

[27] An instance where a church has come into possession of a hide of land within a village is supposed in the formula no. 15 of Form. Sang. Misc. (M. G. LL. 4to, V., pp. 385, 386); here the owner who surrenders his land to the church does so on the condition that he and his wife are to hold it during their life and are to receive in addition *"unam hobam* ex rebus monasterii *in supradicta villa."*

[28] See Coulanges, Les Origines, p. 353, note, for references.

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ulation. This resulted either in the splitting up among several heirs of a freehold barely sufficient in its entirety for the support of one family, or in leaving a part of the population without land. These landless freemen could find employment upon the great estates of the lords, which, composed as they were in some measure of lands not under cultivation, were always in need of cultivators. So they would acquire land upon the domain of a lord and become his tenants.

The Roman practice and the Roman name of "precarium" are continued in this process in the Merovingian period; but here also the incidental form is to be attributed to Roman influence; the essential causes are to be found in the existing conditions of the later Merovingian kingdom.

The character of the relations existing between the lord and his dependents, both retainers and tenants, is difficult to state in definite terms. The instances were so subject to local conditions that they do not yield themselves readily to definite statement. The first class of dependents mentioned were those who commended themselves to the lord and entered his service. They became either his retainers, his followers, or the officials employed in the management of his estates. At first, it would seem, the oversight of the domains and revenues and the care of the household of the lord were in the charge of freedmen and slaves, but later such important positions were intrusted to freemen as well. These free servants might also be used in the administration of justice within the domains which possessed the right of immunity. It does not appear to have been the practice in the Merovingian times for such persons regularly to hold land of the lord; they were rather included in the household of the lord and found their support at the manor-house, if the term may be employed here.

The extent to which these retainers were dependent upon the lord must have varied greatly in the different domains, but also must have been very considerable in most cases. The relationship tended to bring these followers into close personal dependence upon their lord and to withdraw them from their public allegiance. That the latter tendency was opposed when it was assumed without warrant appears from the Alemannian and Bavarian laws,[29] both of which belong to the late Merovingian period; here the free vassi of

[29] Lex Alam., XXXVI, 3; Lex Baiuv., II, 14.

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the duke and the counts are expressly commanded to attend the regular public court. But in the case of an immunity domain whose privilege excluded the public officials from the territory, it is evident that the inhabitants could not be regularly subjected to the public courts. It seems that cases arising between the retainers of the one lord (at least civil cases) would then be judged by the lord or his own judicial officer.[80] Cases in which an independent freeman was a party would doubtless come before the regular public court of the hundred, but even here it seems the retainer might be represented by the lord or his official.[81]

The relationship between the lord and his free tenants must also have varied immensely from domain to domain. The land which the tenant cultivated was held upon terms of a fixed rental, the amount of which must have depended largely upon the circumstances of the individual case. Those dwelling upon immunity lands would be subject in minor cases to the private jurisdiction of the lord. In the case of large estates, and especially of those which included separate tracts of land, the lord created a system of courts over which he set his own officials and to which the tenants were subject. As in the case of the retainers, the tenants were doubtless subject to the public court when an outsider was a party, but here also the lord had the right of representation.

One feature of great importance in the position of the free tenant is to be found in his intimate association as a cultivator of the land of the domain with other cultivators of a lower order of society. These would be slaves who either labored on the lord's

[80] So Coulanges, Les Origines, p. 379: "il nous semble que ce sont les affaires où les deux parties appartiennent également au domaine privilégié." This private jurisdiction is apparently what is meant by the term "mithio" in the formulæ; see Waitz, II, 1, pp. 426 ff: "Ueber die Bedeutung von mithio (mittio)," where the instances of its use and the various explanations are brought together; also Roth, Benef., pp. 163 ff; Coulanges, *l. c.*, pp. 296–298.

[81] This right of representation would appear to be the purpose of the "Carta de causas suspensas" of the formulæ of Marculf, I, no. 23 (M. G. LL. 4to, V., p. 57), by which the cases in which the count or bishop or their followers were interested were to be suspended in the absence of the lord until his return: "ut, dum illis partibus fuerit demoratus, omnes causas suas *suisque amicis aut gasindis, seu undecumque ipse legitimo redebit mitio,* in suspenso debeant resedere."

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immediate domain or were assigned separate plots of land,[32] of freedmen who held land for which they paid rent and services, of coloni who were bound to the soil.[33] Even within the village community hides that had come into the possession of the lord might be cultivated by any of his dependents, free, half-free, or unfree. The free tenants were apparently subject to the same private courts as the other tenants in cases where the domain exercised private jurisdiction; the land they cultivated was governed by the same rules and managed by the same officials of the lord as that of the other tenants. A distinction of course existed in the fact that the relationship was entered into voluntarily by the free tenants; but their everyday relations to the lord of the land would not differ essentially from those of the half-free and unfree tenants. The natural process of assimilation was hastened undoubtedly by the conscious effort of the lord to create of his domain an independent unified corporation.

It is not to be supposed, of course, that the entire free population, or even perhaps the majority, had come into this position of dependence upon the territorial lords. The process reached its greatest development in the Gallic territory, largely because of the influence of a similar Roman development already present. In the German portion of the empire, and especially in those parts which, like Frisia, were absorbed much later than the rest, the great majority of the freemen probably still dwelt in free village communities. Even in Germany, however, natural causes were forcing the freemen in considerable numbers to give up their position as free landowners.[34] The Merovingian kingdom at its later end presents in an unorganized and undeveloped form the essential features of the feudal system; a weak and inefficient central authority, the existence of great estates forming practically independent domains, the gradation of society into classes which foreshadow the feudal vassals, rear-vassals, and serfs.

The next stage in the development which we are tracing corresponds with the organization of the Carolingian empire. A con-

[32] Servi casati, servi mansuarii or mansionarii; see Du Cange, s. v.; von Inama-Sternegg, Deutsche Wirthschaftsgeschichte, I, pp. 122 ff; Waitz, II, 1, 224 ff.

[33] For the coloni see: Coulanges, L'Alleu et le Domaine rural, pp. 355-360; Waitz, *l. c.*, pp. 241-244; von Inama-Sternegg, *l. c.*

[34] See the evidences of the existence of dependent freemen in Alemannia and Bavaria, below, pp. 59 ff, and 121 ff.

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sideration of the work of Charles the Great must take into account the efforts of his predecessors. It was the work of the great Mayors to restore, for the future grandeur of their own house, the neglected, all but ruined heritage of the Merovingian kings. And their efforts at restoration were conditioned by the forces of disintegration which we have seen at work in the earlier period. Just as the monarchy had been weakened by the tendency of the public officials to become independent of the king, by the re-emergence of the tribal units, and by the creation of the independent territorial lordships, so the early Carolings, Pippin the Younger, Charles Martel, and Pippin the Short, found their work ready to their hands in subordinating the great officials, in reducing to allegiance the tribal dukes, in controlling the territorial lords and forcing them to contribute to the expense of the public service.

For our purpose the most important phase of this reassertion of the central authority by the Mayors of the Palace is found in the organization of the relations of the great landlords to the state. The extensive campaigns of Charles Martel against the Frisians and Saxons, against the Mohammedan invaders, and against the revolting dukes of Aquitaine, Bavaria, and Alemannia, made necessary a reorganization of the military system. The most important means which he employed was to force the immense lands of the church to bear a share of the burden from which they had been largely exempt. It seems, however, that the practice of Charles toward the church was not a genuine confiscation or secularization.[85] What he really did was to reduce the great ecclesiastical landlords to subjection to the regular officials, to force them to furnish their share of the fighting men from the inhabitants of their domains, and to make them give out a portion of these domains as benefices to secular lords; in the last case the title of the church to such lands was expressly recognized. This process of creating benefices out of the secular lands was of the greatest importance in the organization of the feudal system, for it gave to Charles Martel and his successors an opportunity to regulate the obligations of the holders; such obligations were then extended to include lands

[85] Roth, Benef., pp. 313-366, and Beylage V; Waitz, III, pp. 14-18, and 36-40.

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held of the king.[86] In this way the requirement of military service became a recognized element in the tenure of the great estates. The special purpose of the new arrangement was to secure a force of cavalry to use against the Moorish horsemen; the holder of the benefice was required to furnish a troop of mounted followers.

Another important result of this organization of benefices was the establishing of the retainers of the lord upon lands in his domain. In the Carolingian period the vassal of the lord regularly holds an estate from him. This seems to have been a result of the military requirement. To fulfill this the lord found it to his advantage to give out parts of his domain to his immediate vassals and then to pass the obligation on to them, requiring each of them to furnish a part of the quota of the whole domain.

The Carolingian organization can be traced more clearly, however, in the work of Charles the Great. The conscious effort of Charles to reduce the whole empire to a homogeneous system under his control is very completely reflected in the great amount of legislation of which he was the author. This was a task of immense proportions. The vast empire over which he held such absolute sway was composed of various and heterogeneous elements — new elements incorporated bodily in the empire by the conquests of Charles himself, old elements taken over which had never been perfectly fused. The whole period from the invasions to the end of the Carolingian era is one of premature development. The tribal kingdoms had undergone an inordinately rapid development; time had not been given for the Roman and German elements in the separate kingdoms to unite into national populations before they were absorbed by the Frankish kingdom. It was then the task of the Merovingian state to complete this process and to fuse the distinct tribal units into a nation. For this work the fated Merovingian monarchy proved itself quite inadequate. Indeed, this period, by reason of its internal disorders, gave opportunity for the growth of still another element of discord in the creation of independent territorial lordships. Some progress against this centrifugal tendency resulted from the labors of the earlier Carolingians,

[86] Waitz, III, p. 19: "Dies hat dann nothwendig zu einer weitern Ausbildung der Beneficialverhältnisse überhaupt geführt. Man stellte auch andere Landverleihungen, die von dem Fränkischen Herrscher ausgingen, diesen Beneficien gleich."

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but the problem was handed on to Charles the Great with its difficulties practically undiminished.

We are able to see now that the problem was too great for solution by any one man, and that Charles did not use the wisest means in attempting to solve it. His rule may be said on the whole to have resulted in an acceleration of the progress toward disintegration, in that, on the one hand, he added to the cumbersomeness of the machine to be controlled, and, on the other, the system of control was based to a certain extent on a recognition of the existing forces of disruption, over against which was set an inadequate restraint by the representatives of the central authority.

The organization of the empire of Charles the Great may be sketched along the lines followed in considering the Merovingian administration: the reform of the public administration, the reduction of the tribal dukes, and the policy of Charles toward the landlords. We may then notice the results of his rule, especially upon the position of the freemen. The general form of the public administration was the same under Charles[37] as it had been under the Merovingians. The regular administrative district was the county, the ordinary public official was the count. The growing tendency of the counts to become independent of the central authority had been checked by the earlier Carolingians and disappeared almost entirely under Charles. The counts were again brought under the control of the monarch and made to act as royal officials. He seems at times to have raised men of inferior rank to that position and to have shown in some instances a definite intention to exclude great territorial lords from office. But this cannot be said to have been the regular practice. There are still instances of the succession of sons to fathers in the office[38] and of the appointment of men of wealth and family in the county. Moreover, the appointment was in most cases for life. The subordination of the counts to the monarch was due, therefore, not so much to a change in the nature of the office as to the greater power of the monarchy under Charles and to the employment of the missi.

[37] In regard to the public administration of the Carolingian empire see Waitz, D. VG., III, pp. 341-643; Coulanges, Les Transformations de la Royauté pendant l'Epoque carolingienne, liv. iii (pp. 209-569); Glasson, Histoire du Droit et des Institutions de la France, II, ch. 4; III, ch. 8.

[38] See the references given by Waitz, III, 387.

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Centenarii still existed in the Carolingian administration, and the freemen of the hundred were given some share along with the count in their selection, but in practice probably this share was very slight. The centenarii are regularly named along with the vicarii and other subordinates of the count, and are expressly called ministri or ministeriales comitis.[39] Where the hundred-men still existed, therefore, they had ceased to represent primarily the freemen of the hundred and had been drawn into the royal administration.

Of importance for the future evolution was the creation of a special set of officials to guard the extensive frontier of the empire, the counts of the marks (comites marcharum, marchiones). The reduction of the outlying tribes of the German race had brought the limits of the empire up to the heathen and hostile nations on every side. For the protection of these boundaries Charles created special districts, usually made up of land won from the enemy's territory, and set over these districts specially privileged officials. The constant danger threatening such a position and the consequent necessity of immediate action required that the official to whom the mark was intrusted be given extraordinary powers. When in the following period the central authority breaks down, these officials appear among the most powerful of the feudal lords.

Perhaps the most effective means of centralizing the administration was found in the employment of the royal missi. There are frequent instances of the occasional use of royal representatives, with the title of missi, by the Merovingians and the Mayors, but the practice of using the missi as regular officials with definite and prescribed duties belongs to the empire of Charles. In general two missi were assigned to each district (missaticum) for one year. They were to hold special courts, to hear and act upon complaints against the regular officials, and to report to the emperor the condition of the realm. In this way Charles attempted to keep his hand upon the most distant parts of his great dominions and to make his authority felt in the smallest divisions.[40]

[39] See Waitz, III, 391–397, and the references given there.

[40] See especially Capit. Missorum generale (M. G. LL. 4to, II, 1, no. 33, pp. 91 ff) and the long list of additional capitularies in regard to the missi: nos. 34, 35, 40, 43, 44, 46, etc.

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Another important instrument of the central government employed by Charles was the annual assembly.[41] This had remained a feature of the Frankish system from the earliest times, but it became under Charles a very important part of the central administration. It preserved its popular character only in so far as it was still used as the meeting of the host preparatory to a military campaign, but it cannot be reckoned as an instituion by which the rights of the freemen to participate in the government were effectively perpetuated. It was rather the means which the emperor used to control his officials and to unify the administration. Here the counts and the missi made their reports and received their instructions; here important legislation was discussed by the monarch and his chief advisers and promulgated to the populace. In the framing of the legislation the attending freemen had no part at all, and in the acceptance of it only a formal participation.

The policy of Charles toward the tribal dukes was a continuation of the policy of the earlier Carolingians and indeed of that of the Merovingians whenever they were able to turn from internal wars to look after the welfare of their dominions in general. This policy was to reduce the dukes to subjection to the Frankish monarch and to assimilate the tribes to the Frankish system by dividing them into counties. It finds expression under Charles in his dealings with the rebellious dukes of Aquitaine and Bavaria and in his treatment of the conquered Saxon and Lombard territories. Charles carried it a step further by abolishing the office of the tribal dukes, and ruling over the counts directly.

For our purpose the most important element of the administration of Charles was the recognition and organization of the existing feudal institutions.[42] It has been suggested that herein is to be found the essential failure of his rule and the explanation of the rapid disintegration of his empire. No small part of the functions of the state was left in the hands of the territorial lords, and this system was given a definite and legal form in the legislation of Charles. In many relations the lords exercised the authority of

[41] Hincmar, de Ordine Palatii, ch. 29, 30 (Prou, Hincmari Epistola de Ordine Palatii; Paris, 1884).

[42] In this regard see Waitz, IV, chaps. 7–9, pp. 175-702; Roth, Beneficialwesen, 4. Buch (pp. 313-418), and Feudalität, *passim;* Coulanges, Les Transformations, liv. iv (pp. 573-703).

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the public officials and were used by the emperor to transmit his authority to the lower classes of population. The relations of the dependent classes to their lords, which had been largely of an extra-legal character, were now defined in the law, partly with an eye to securing the state, partly even for the purpose of protecting the dependent freemen from unjust exactions, but in either case with the result eventually of increasing the powers of the lords over their dependents.

The reign of Charles was characterized by the unifying of the various kinds of domain to the one standard of the benefice. This was begun, as we have seen, under the Mayors of the Palace, and was the result largely of the creation of secular benefices from the lands of the church. Under Charles the holding of a benefice was regularly connected with the entrance of the holder into the relation of vassal of the emperor. While not every vassal may have been given a benefice, yet the converse seems true: every one who received a benefice from the royal lands had to commend himself to the emperor, take the oath of fidelity, and become his vassal. This organization was copied by the lords in regard to their dependents. Practically all the sub-vassals received benefices and took the oath of fidelity.

The increase in the granting of immunity and the organization of immunity jurisdiction was of great importance in the development of this period, especially in its effect upon the position of the freemen, an aspect of the matter that will be considered later. This increase is due mainly to two causes: first, the power of the church under Charles, which regularly secured the right of immunity over its estates; and, second, the character of the administration of the royal domain lands. From the beginning the royal lands were managed for the king by a special set of officials and the regular public officers were excluded from them. This character was regularly taken over under Charles by the recipient of a benefice from the royal lands and also by the holder of a benefice from the church lands. Thus a grant of immunity came to be regularly associated with the holding of a benefice. For the jurisdiction of such domains the lords were required by Charles to appoint responsible men and men acquainted with the law as officials of their private courts. These arrangements can be followed more clearly in regard to the

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domains of the church, which of course preserved their documents more carefully than did the secular lords.

In general this private jurisdiction over dependent freemen on immunity domains included the "low justice," that is, all civil cases, and perhaps criminal cases of a minor sort, in which inhabitants of the domain alone were parties. The "high justice" was exercised by the counts, and the inhabitant of the domain was in such cases handed over to the regular officials by the lord. Where the ordinary subject of the count was a party, the dweller on the immunity domain was held to the regular court, but the lord was supposed to represent his dependent and was held responsible for him.[43] The right of immunity under Charles, therefore, does not differ greatly in kind from that with which we are familiar in Merovingian times; the distinction between the two is to be seen mainly in the increase of the practice and in the organization of the system in law which characterized the Carolingian régime.

Another important function of the state intrusted in a considerable degree to the lord was the enforcement of military service. The reforms of Charles and his predecessors in this regard aimed at increasing both the efficiency of the army and the available amount of fighting men. This was brought about by the creation of a special cavalry troop and by the more strict enforcement of the military obligation of every freeman. The part of the lord was, on the one hand, to bring his vassals to the army as a mounted troop and, on the other, to force all his dependent free tenants to obey the military summons. Since the public officials were commonly excluded from the immunity domains, it fell to the lord to enforce the "heerbann" and to bring the free tenants of his estates to the army. Such freemen were part of the muster of the county in which they lived, but formed distinct divisions under the command of the lord's officers. The furnishing of a troop of mounted vassals was one of the terms of tenure of the lord, a feudal due, while the control of the freemen was the delegation of a public function.

The sum of the powers of the lord over his dependents is expressed in the seniorate.[44] The emperor is the senior of his vassals,

[43] Bethmann-Hollweg, Germ.-rom. Civilprozess, II, sec. 77, "Die Gerichtsimmunitäten."

[44] Roth, Feudalität, Abschn. 4, "Das Seniorat," pp. 205–321.

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the lord is the senior of his dependents. In the benefice most of the ordinary relations of the subjects to the state are absorbed in the subjection of the inhabitant to the lord. The "homines" had to swear to be faithful to the lord; they were required to appear before his court in ordinary cases, and to obey his summons to war. The relationship could not be broken on either side without just cause. The senior, on his part, was bound to support his dependents and to protect and represent them in their relations to a third party, whether such party was the state or another lord.

When we look at the results of this system upon the position of the lord toward the royal authority, the important fact seems to be the immense gain accruing to the lord from the combining and unifying of his power. The holder of a benefice is regularly now a vassal of the emperor, the lord of an immunity domain, and the senior of the inhabitants of his land. On the other hand, the control of the emperor over his vassals is organized and their duties to him are regulated by law. But this fact cannot be said to counterbalance the latent danger in giving so much authority to the lords. The restrictions upon their power are not of a kind to endure, being in their nature dependent for their efficiency upon the strength and wisdom of the monarch, while the feudal forces they were intended to restrain were possessed of great natural capabilities of growth and extension. And further such restrictions were almost completely nullified by the confusion of relations; the public official himself was in most cases the owner of a benefice and the lord of an immunity domain. The same confusion appears in the position of the emperor. The commands of Charles to his officials bear not infrequently the nature of the commands of a senior to his vassals, and his authority depends as much upon the fact that he is overlord of the great vassals as upon the fact that he is emperor. Thus the public authority is weakened at every stage by the recognition of essentially feudal relations: in the control of the dependent population, in the authority of the public officials over the territorial lords, in the nature of the imperial authority itself.

The effect of all this development upon the freemen may be summed up briefly, since the general results have been suggested in the foregoing paragraphs. First, it should be noticed that not all the freemen had become dependent. There still existed free landowners in the village communities who were subject only to the reg-

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ular public officials. Moreover, Charles was not without a consciousness of his duty toward that part of the population. Those in authority, secular and ecclesiastical lords and public officials, were expressly forbidden to use their power to oppress the freemen.[45] But such commands were of slight avail against the prevailing tendency of the time. While the arbitrary and violent reduction of freemen to dependence was restrained by Charles, the economic pressure continued to bear with ever increasing force upon the weaker portion of the population. The astounding military achievements of Charles laid an immense burden upon society which was borne eventually by the cultivators of the soil. A considerable portion of the legislative activity of Charles was taken up with the regulation of this burden and with the fines for neglect of the summons to war.[46] It became ever more difficult for the small landowner to maintain his position in the face of this burden, while by becoming a tenant of the lord the difficulty was greatly lessened.

The organization of the relations of the landlord to the state was of the greatest importance for the position of the dependent population. The fact that the lord was possessed regularly of the powers and authority of a holder of a benefice, of a vassal of the emperor, of a possessor of an immunity domain, and of a senior, had a corresponding effect upon the position of the inhabitant of the domain. Under the empire of Charles the Great the tenant of an immunity domain enters into the personal and political dependence upon the lord; he becomes tenant, vassal, and subject at once.

We have seen that in Merovingian times the association of the free tenants with the lower orders of cultivators tended to reduce them to the lower level. This process would be advanced by the mere operation of time, but it would also be greatly hastened by the increased authority of the lord within his domain which resulted from the legislation of Charles. Further, the organization

[45] Capit. Missorum generale, a. 802 (M. G. LL. 4to, II, 1, no. 33), c. 25; Pauperes nequaquam oppriment; Cap. Miss. spec. (no. 34), c. 12: De oppressione liberorum hominum pauperum; Cap. Miss., a. 805 (no. 44), c. 16: De obpressione pauperum liberorum hominum, ut non fiant a potentioribus; Cap. Omnibus (no. 57), c. 12: Ut liberi homines nullum obsequium comitibus faciant; Cap. e Canonibus exc. (no. 78), c. 22: Ut comites vel vicarii seu iudices aut centenarii sub mala occasione vel ingenio res pauperum non emant nec vi tollant; etc., etc.

[46] See Capitularies, nos. 44, c. 19; 48; 50; 74, etc.

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of the royal domains by the emperor for the purpose of increasing the income from them[47] would serve as a model for the lords and would aid them in reducing their domains to a uniform system. The interest of the lord was concerned rather with increasing the efficiency of his lands as a source of income than with preserving class distinctions among his tenants.

Of the freemen who were forced into economic dependence by the stress of the later Merovingian period, one class was able to take advantage of the development and to be drawn into the system that was to rule in the suceeding period. These were the retainers of the lord, the later rear-vassals. By the practice, which in the Carolingian empire became common among the great lords, of giving out portions of their domains to their retainers on terms not essentially dissimilar from those on which they held their own estates from the emperor, these latter came into possession of the essential capital of the feudal society, estates held on terms of personal allegiance and military service; and thus composed a second rank in the feudal nobility.

The break up of the empire of Charles the Great presents a striking parallel to the later Merovingian history. The frequent divisions of the empire, which follow more or less closely the lines of racial or tribal distinction, the fraternal struggles resulting in great internal discord and insecurity, the weakness of the central government and the consequent strength of the territorial lords — these are phenomena common to both periods. The empire of Charles was an intermission, a break in the development, which, however, added certain new elements to that development when it took up its interrupted course. The natural forces of disintegration which have been at work during the whole period we have studied thus far and which more than any political cause account for the sudden dissolution of the empire, are of two kinds: the tendency toward the reassertion of national unity on the part of the different races composing the empire, and the growth of feudal estates.

The tendency of the empire to break up into regions characterized by a certain homogeneity of population was not without influence upon the divisions of the empire. While this tendency does

[47] Capit. de Villis, M. G. LL. 4to, II, 1, no. 32, pp. 82 ff.

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not appear to have affected the division made by Charles, its influence is to be recognized in the divisions of Louis and the treaties of partition between his sons and successors. From these divisions the territories emerged which correspond rather closely to the modern countries of France, Germany, and Italy. But these represented rather racial and geographical differences than tribal distinctions. It is in the divisions within these territories, especially in the great duchies of Franconia, Suabia, Saxony, Thuringia, and Bavaria of the German portion, that the old tribes are perpetuated.

The important feature of this epoch, however, is the rapid development of the territorial lords into feudal nobles. In this period the error in the policy of Charles the Great toward these lords becomes apparent. They come forth under the later Carolingians strengthened by the unification of their powers and prerogatives and unhampered by the restrictions which Charles had established to hold them in check. The missi either disappear or themselves become territorial lords,[48] the counts of the marks, who had been created for the purpose of protecting the frontiers, become great landed nobles, the regulations of estates which had been intended by Charles to reduce them to the control of the central authority are used by the lords to strengthen their own position and to depress still further the dependent freemen. The political dissolution of the empire, the degradation of the title of emperor, the disastrous wars of the descendants of Charles, gave opportunity for the lords to complete their independent development and to round out their dominions. At the same time and at a corresponding rate the economic and political pressure upon the freemen who attempted to maintain their independence became more severe. By the end of this period of anarchy the small free land-owner had become almost an anomaly in the system. The rear-vassals, who in the time of Charles had obtained benefices from their lords, had prospered along with their masters in this period and had won a recognized position for themselves in the new society which was emerging from the chaos of the end of the ninth century.

We have followed the development of German society from the time of the invasion to the appearance of the feudal system. Dur-

[48] Thompson, The Decline of the Missi dominici in Frankish Gaul, Decennial Publications of the University of Chicago, Vol. IV.

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ing this period the freemen have undergone a steady decline in economic, social, and political importance. From free land-owners and equal participants in a state based largely upon local self-government and elected officials, they have become in the main practically unfree tenants, dependent economically and politically upon the feudal lords. At the same time a part of the population has risen by its fortunate possession of land, the new source of power, to form the feudal nobles, the actual powers in the new states.

The decline of the freeman and the rise of the new noble was begun in the tribal kingdoms. In some of the kingdoms this process had affected the tribal laws so that a new classification of society was established, based upon the changed conditions. The new classes were named according to their value to the new society; minores, mediocres, primi, etc. In the following sections the attempt will be made to determine in each law the constituency of the classes so named and the causes which brought them into existence.

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CHAPTER I. THE BURGUNDIAN CODE.

The law of the Burgundian kingdom is contained in two codes, Liber Constitutionum, sive Lex Gundobada, and Lex Romana. The former is the general law of the kingdom, with especial reference to the Burgundians, while the second is the particular law of the Roman inhabitants. Both of these laws-books are ascribed to the authorship of Gundobad (473-516). The Liber Constitutionum, with which we shall be particularly concerned in this study, has been assigned to various dates, but the conclusion that seems most probable is that the bulk of the law was edited by Gundobad between the years 500 and 502, and that a later edition was made by Sigismund with certain additions in 517, in which form it has come down to us.[1]

The Liber Constitutionum is in the main what its title indicates — a book of laws in the form of royal decrees or constitutions. The majority of the titles contain some definite expression of the royal will: presenti lege decernimus, presenti lege oportuit definiri, censuimus, iubemus, volumus custodiri, etc. Some of the titles bear a date line as if they were distinct documents: Data sub die, etc. There are, however, other titles the form of which is that of the customary laws: Si quis; Quicumque, etc. Some of these contain no expression of personal command; others have such expressions in one or more of the sections, frequently the last, indicating that the customary law had been issued by the royal authority with an addition or correction.[2]

In the Liber Constitutionum a distinction is made between three classes in the following instances:

1) In regard to wergeld:

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[1] M. G. LL. 4to, I, tom. 2, pars 1, praefatio, pp. 5-11; Savigny, Geschichte des röm. Rechts im Mittelalter, II, p. 3; Brunner, RG., pp. 332-340; Gaupp, Ansiedlungen, pp. 296-317.

[2] Cf. title II, below: illud sane huic legi *rationabili censuimus provisione subiungi.*

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II. DE HOMICIDIIS.

1. Si quis hominem ingenuum ex populo nostro cuiuslibet nationis aut servum regis, natione duntaxat barbarum, occidere damnabili ausu aut temeritate praesumpserit, non aliter admissum crimen quam sanguinis sui effusione conponat.

2. Illud sane huic legi rationabili censuimus provisione subiungi, ut si cui forte a quocumque inlata vis fuerit, ut aut ictibus verberum aut vulneribus urgeatur, et dum sequitur percutientem dolore aut indignatione conpulsus occiderit, atque ita factum re ipsa aut idoneis, quibus credi possit, testibus fuerit conprobatum, medietatem pretii secundum qualitatem personae occisi parentibus cogatur exsolvere; hoc est: *si obtimatem nobilem occiderit,* in medietatem pretii CL solidos, si *aliquem in populo mediocri,* C solidos, pro *minore persona* LXXV solidos praecipimus numerari.

2) in one instance (and only one) in regard to compensation for injury:

XXIV. DE EXCUSSIS DENTIBUS.

1. Si quis quolibet casu dentem obtimati burgundioni vel Romano nobili excusserit, solidos XV cogatur exsolvere.

2. De mediocribus personis ingenuis, tam Burgundionibus quam Romanis, si dens excussus fuerit, X solidis conponatur.

3. De inferioribus personis, V solidis.

* * * * * *

5. Si quis ingenuus liberto dentem excusserit, inferat ei solidos III; si servo alieno dentem excusserit, inferat ei, cuius servus est, solidos II.

3) in regard to the *wittum:*

CI. DE WITTIMON.

1. Quicumque Burgundio alicuius obtimatis aut mediocris sine ordinatione patris cum alicuius filia se copulaverit, iubemus, ut tripla solutione obtimatis ille qui fuerit

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patri ipsi, cum cuius filia se copulavit et eum ante scire non fecit nec consilium petiit, CL solidos ei cogatur exsolvere, et multae nomine solidos XXXVI.

2. Leudis vero si hoc praesumpserit facere, similiter in tripla solutione, hoc est solidos XLV, et multae nomine solidos XII.

The meaning of this last is not quite clear, but the following seems to be the most probable interpretation: The Burgundian who marries the daughter of either an obtimas or mediocris without the consent of the father must pay three times the legal wittum (pretium nuptiale)[3] of the obtimas class, *i. e.*, 3 x 50 solidi, and a fine of 36 solidi, while he who is guilty of the same injury to a leudis is to pay three times the wittum of the leudis, 3 x 15 solidi, and a fine of 12 solidi. This 15 solidi wittum of the leudis may have a close connection with the 15 solidi to be paid by the ravisher of a maiden, where the element of consent is evident (XLIV, 1).

In these three cases the first or highest class is variously designated as obtimas nobilis, obtimas Burgundio vel Romanus nobilis, and obtimas; the second as aliquis in populo mediocri, mediocres personae, and mediocris; the third as minor persona, inferiores personae, and leudis. The distinctions made may be tabulated thus:

	Wergeld	Compensation for broken tooth	Wittum
Obtimas	300 sol.	15 sol.	50 sol.
Mediocris	200 sol.	10 sol.	
Minor	150 sol.	5 sol.	15 sol.

These are the only cases where such a classification is made in the law. The term obtimas occurs in several other instances, which will be considered when we consider that class separately; the terms mediocris, minor persona, inferior persona, leudis, are

[3] See Sohm, Recht der Eheschliessung, pp. 22 f: "Der Kaufpreis ist dem Verlobungsvertrage wesentlich. Er führt in der deutschen Rechtssprache den technischen Namen 'Witthum.' . . . Das Witthum ist der gesetzliche Preis der Jungfrau, gleich dem Wergelde nach dem Stande, d. h., nach dem rechtlichen Werth ihrer Persönlichkeit sich bestimmend."

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found only in the titles quoted. Our problem is to discover the basis for making these distinctions.

It seems clear from the law that the division is a division of free men, and that therefore the lowest class is made up of freemen. In title II the general rule against killing (sec. 1) reads: Si quis ingenuum hominem . . . aut servum regis; and the modification in sec. 2, which gives the fines for killing in self-defense would refer to the same general classes, but it is probable that the servus regis, who was given the special protection by being placed on an equal footing with the freemen in regard to killing, was not intended to be included in the classification of sec. 2. This appears from the fact that the composition was to be paid to the relatives of the man who was slain (medietatem pretii secundum qualitatem personae *occisi parentibus* cogatur exsolvere), which probably would not be the case if the slain man was a slave, even of the king.

Title XXVI, above, gives this classification: obtimas, mediocris, inferior, libertus, servus. In all other cases where a difference is made in regard to payment of fine for injury, the classification reads: *ingenuus,* libertus, servus, (V, XXXII, XXXIII). The three classes mentioned in XXVI, obtimas, mediocris, inferior, correspond, therefore, to ingenuus in the usual classification.

The term leudis in CI is of little assistance in the investigation of the value of the lowest class. There is nothing in the law to indicate its technical meaning, and arguments from etymology are too uncertain to be of much value in such a case.[4]

The lowest class in this system is then made up of freemen. It is necessary to determine first of all why the member of this class is termed minor, inferior; in comparison with what persons he is less important and inferior. In determining this it is to be noticed that there is no mention elsewhere in the law of a class of in-

[4] Cf. Waitz, D. VG., II, 1, pp. 348 f: "Wer unter diesen Leudes zu verstehen, darüber sind die Meinungen seit lange weit aus einander gegangen. . . . Das Wort findet sich auch bei anderen Deutschen Stämmen, bei Burgunden, Westgothen und Angelsachsen. Dort bezeichnet es allgemein die gewöhnlichen Freien; und dem entspricht es, wenn das Wergeld, welches den freien Mann repräsentierte, bei den Franken and Friesen leudis, leodis, bei den Angelsachsen leodgeld genannt wird." See also Roth, Benef., 276–313, Coulanges, La Monarchie franque, pp. 77-80; Braumann, De leudibus in regno merowingorum, p. 16.

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ferior freemen. If the minores, inferiores, constituted a class generally recognized as being lower in rank or importance than the ordinary freemen, such a class would of necessity appear in the law. But the law in general deals with freemen as a whole as the regular subjects, and no invidious distinctions are made save in the titles quoted. These derogatory terms occur only twice, and in both cases they are used along with the terms obtimas and mediocris. The obvious inference is that this lowest class is the mass of the free population and that the members of it are known as minores and inferiores only by way of contrast with the two higher classes mentioned in the same section.

There are also certain positive indications that the lowest class is made up of the ordinary freemen. Aside from the argument to be derived from the primitive meaning of the word leudis, it has been already suggested that the wittum of the daughter of the leudis, *i. e.*, the minor, inferior, is the same as the wittum of the ordinary free maiden. A more convincing evidence is that adduced by Wilda,[5] from a comparison of title XLVIII with title XCIII:

> XLVIII, 1. Si quis igitur fustis aut lapidis brachium alterius fregerit et usum eiusdem membri percussus sine certa debilitate receperit, *decimam partem pretii eius secundum qualitatem personae,* sicut anterioribus legibus docetur adscriptum, auctor facti cogatur exsolvere.
>
> XCIII. Quicumque de lapide aut fuste vel secure inversa cuicumque brachium aut tibiam fregerit, iubemus eum, *ut XV solidos solvat,* et multae nomine solidos VI.

The compensation of 15 solidi to be paid to anyone (cuicumque) in title XCIII, is replaced in XLVIII by the "tenth part of the wergeld according to the rank of the person"; *i. e.*, for the obtimas, 30 solidi; for the mediocris, 20 solidi; for the minor, 15 solidi. This suggests that the basis of the system of fines is the wergeld of 150 solidi; that the wergeld of the minor is the wergeld of the regular subject of the law, the ordinary freeman.

If the lowest class in the scale given in these three titles comprises the mass of the population, the freemen in general, the other two classes must be made up of a portion of the people possessed of certain characteristics which would enhance their value before

[5] Geschichte des deutschen Strafrechts, I, p. 424.

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the law. It will be seen that in the scale as given in CI, De Wittimon, the obtimas and mediocris together are contrasted with the leudis, the ordinary freeman.

Such a general distinction between the people as a whole and a specially favored portion of the people is found in certain sections. This appears most clearly in LIV, 1:

> 1. Licet eodem tempore, quo populus noster mancipiorum tertiam et duas terrarum partes accepit, eiusmodi a nobis fuerit amissa praeceptio, ut quicumque agrum cum mancipiis seu parentum nostrorum sive nostra largitate perceperat, nec manicipiorum tertiam nec duas terrarum partes ex eo loco, in quo ei hospitalitas fuerat delegata requireret, tamen, etc.

Here the difference is made between "our people" and "whoever had received an estate from our bounty or that of our parents."

A similar distinction occurs in XXXVIII: De hospitalitate legatis extranearum gentium et itinerantibus non neganda.

> 5. Hiemis autem tempore si quid legatus foeni aut ordei praesumpserit, similiter a consistentibus intra terminum villae ipsius, tam Burgundionibus quam Romanis, sine contradictione aliqua conferatur. Quod tamen a maioribus personis præcipimus custodiri.
>
> 6. Ceterum si talis persona est, quae ex munificentia nostra legatum possit excipere, ipse tantum sua expensa legatis una nocte praeparet mansionem.

By the phrase "those dwelling within the limits of that villa" (consistentibus intra terminum villae ipsius) is evidently meant the body of freemen, for section 11 provides for the other inhabitants of the village (quod de Burgundionum et Romanorum omnium *colonis* et *servis* praecipimus custodiri). Set over against the regular inhabitants is "he who by reason of our munificence is able to entertain a legate" (talis persona quae ex munificentia nostra legatum possit excipere). *Maiores personae* of section 5 are, it would appear, the wealthier members of the community, to be reckoned, however, among the regular inhabitants.

In these sections the distinction is based upon the origin of the land held by the freemen in general, on the one hand, and by

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that particular part of the people, on the other. The portion of the population distinguished from the regular subjects of the law is composed of those who possess land from the gift of the king. In order to understand this distinction more clearly and to determine whether or not the class thus set apart can be made to correspond to the two classes known as obtimates and mediocres who are possessed of a higher wergeld than the ordinary freemen, it will be necessary to consider the manner of settlement of the Burgundians upon that portion of the Roman territory which later became the Burgundian kingdom, and the provision made for the freemen of the tribe. It will be sufficient for our purpose to give the main outlines of the settlement and to confine our attention more particularly to the details to be found in the Burgundian law.[6]

The references to the settlement of the Burgundians are found in Prosper Tiro, anno 443: "Sabaudia Burgundionum reliquiis datur cum indigenis dividenda;" and the Chronicle of Marius, anno 456: "Eo anno Burgundiones partem Galliae occupaverunt, terrasque cum Gallicis senatoribus diviserunt." Binding (*l. c.*, pp. 4-14) and Gaupp (*l. c.*, p. 318) regard these two statements as referring to two separate events; Bethman-Hollweg (Germ.-rom. Civilprozess, I, p. 143, n. 10) argues that the same event is referred to in both cases. However that may be, the statement of Marius clearly indicates that the settlement was carried out by assigning the individual Burgundians to individual Roman land-owners of the wealthy class. The terms of the original settlement are not known; both Gaupp and Binding argue that the division gave to the Burgundian the half of the real property of the Roman landlord. This division was made apparently by the Roman authorities, the Burgundians standing then to the Roman empire in the relation of mercenaries. But the almost immediate decay of the Roman authority and power in the west and the establishment of the independent kingdom of the Burgundians gave opportunity for a new adjustment of the relations in favor of the Burgundians. This probably is the time referred to in LIV: "that time, in which our people received one-third of the slaves and two-thirds of the lands." Title LIV is

[6] The classic authorities on this question are Gaupp, Die Germanischen Ansiedlungen und Landtheilungen, and Binding, Das Burgundisch-Romanische Königreich, I; see especially in Gaupp, 6. Abschn., 1. Cap., pp. 274-371, and in Binding, pp. 13-38.

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intended to correct certain abuses which had grown out of this situation, requiring restitution of the property taken from the Roman possessors contrary to command, by those who had been endowed with goods by the king, and punishing aggression upon the Roman hospites on the part of the Burgundian settlers. What appears to be a later provision occurs in the Constitutiones Extravagantes, XXI, 12:

> 12. De Romanis vero hoc ordinavimus, ut non amplius a Burgundionibus, qui infra venerunt, requiratur, quam ad praesens necessitas fuerit: medietas terrae. Alia vero medietas cum integritate mancipiorum a Romanis teneatur, nec exinde ullam violentiam patiantur.

If "infra" may be translated "later," this would seem to be a provision that the newcomers (perhaps members of that portion of the old Burgundian tribe who had not taken part in the battle against the Huns, but had remained in the former Burgundian territory in the north) were permitted to take only one-half of the land of the Roman possessor to whom they were assigned.[7]

The comparatively small number of the Burgundians who were originally assigned land in this region would permit of their being settled thus only on the larger Roman land-holders. The portion acquired on these terms by the Burgundian was known as his *sors*.

It is evident that the ordinary Burgundian freemen were settled on these terms. In LIV, 1, the distinction made between "our people" who "received one-third of the slaves and two-thirds of the lands" and "the one who had received land with slaves from our munificence or that of our predecessors" shows clearly that it was the Burgundians in general who settled on these terms, while those favored by the king were endowed from the royal possessions.[8]

There is nothing to indicate that the ordinary freeman has sunk to a dependent position at the time of the issuing of the law.

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[7] So Gaupp, p. 342, and Bethmann-Hollweg, p. 146, n. 27; otherwise Binding, p. 32, n. 113. This title is usually credited to Godomer.

[8] The use of the term faramanni in LIV for the Burgundian hospites may be regarded as strengthening the argument. The term seems to mean families or heads of families, and suggests the Germanic idea of a freeman as the head of a family entitled to a portion of land sufficient to maintain his household. For a summary of the authorities on the etymology of the word, see Binding, p. 22, n. 77.

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On the contrary, the sors is treated as the regular holding of the freeman, and is subject to the restrictions commonly found in the Germanic law applied to the alod of the freeman. The father may give to any one from the common property and from the product of his labor, except the land acquired by title of his sors (I, 1: absque terra sortis titulo adquisita); the sors regularly descended to the sons (LXXVIII, 3), unless there were no sons, in which case the daughter succeeded to the hereditas of both father and mother (XIV, 1); the hereditas of the father is expressly called the sors (XIV, 5: hereditate patris . . . hoc est, de ea tantum terra, quam pater eius *sortis iure possidens mortis tempore dereliquit*). These provisions are perfectly general in their nature, except, of course, that they refer to Burgundians; it seems clear, therefore, that the sors is regarded as the ordinary holding of the Burgundian freeman; or, from the other point of view, that the Burgundian freeman is regarded regularly as the owner of a sors.

To recapitulate: the minor, inferior persona is the ordinary freeman, who appears as of lower rank and less value in the law only when contrasted with the higher classes, obtimates and mediocres; his position is that of a free land-holder, his holding being the sors obtained from the Roman possessor by the terms of settlement.

It remains to be seen if those persons whose peculiar position depends upon their possession of land from the royal domains can be identified with those who are called obtimates and mediocres. The question may be put in this form: Does the fact that such persons were possessed of land given them by the king account for their having a higher wergeld than the ordinary freemen? This question may best be answered by considering: 1) the character of the Burgundian constitution, from which we may determine what persons would be regarded as important in the eyes of the law; 2) the position of the obtimas and the mediocris in the law, as far as any data may be found.

Although one of the earliest of the Germanic codes, the Burgundian law shows a remarkable development away from the democratic and toward the monarchical state. The king and his advisors make the laws, most of which are in the form of royal decrees; the inhabitants are called "populus noster;" the land of the kingdom is known as "provinciae ad nos pertinentes;" the authority

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within the administrative districts belongs to his counts (comites nostri). There is no evidence that the people had any share in either administration or legislation.[9] This rapid development may be ascribed to the early relations existing between the Burgundians and Romans before the settlement and to the settlement itself upon thoroughly Roman soil while the Roman institutions were still in force.

In a state of this character the importance of persons would depend directly upon their value to the monarch, and this importance would be reflected in the laws issuing from that monarch. But the persons of value to the king would be also, in the main, those who would receive gifts of land from the king; for the imperial domains and other lands which on the extinction of Roman authority within the region naturally fell to the head of the Burgundian state[10] would be used by him in creating a royal administration. In the possession of these lands the king would have a fund from which to reward servants and win supporters. The natural recipients of his bounty would be the officials of the kingdom and of his own household, his personal comitatus and his friends in general, some of whom might have no claim on the public (*i. e.*, royal) treasury other than royal favor. At a similar stage a like process takes place in the other Germanic kingdoms; the new monarch, coming into possession of large tracts of lands, uses this source of wealth to create a royal administration and to reward friends and servants.[11]

The way this occurred in the Burgundian kingdom is partially illustrated in the law. Title LIV, 1, part of which is quoted above, speaks of "our command that whoever had received land and slaves from our bounty or that of our parents should not demand a third of the slaves and two-thirds of the land [the portion of the regular freeman] from that place where he was settled." This refers to

[9] The absence of a dependent class of freemen usually found in such a state is easily accounted for by the brief interval between the settlement and the appearance of the law.

[10] Gaupp, pp. 334, 335: "Nach mehreren Aeusserungen des Gesetzbuches müssen die Burgundischen Könige von Anfang an im Besitze eines ausgedehnten Grundeigenthums gewesen sein. . . . Mit grösster Wahrscheinlichkeit lässt sich vermuthen, dass die Germanischen Könige überall das sehr bedeutende Vermögen der kaiserlichen Krone für sich in Besitz nahmen."

[11] See introduction, pp. 12 ff.

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the original gifts of land at the time when the relations between the Burgundians and Romans were first adjusted by decree of the Burgundian king. Such gifts would be made at that time to those who were closest to the king, or who were already engaged in his service.

A later provision is that contained in title I, 4:

> Id etiam statuentes, ut si quid etiam de nostro munere perceperunt aut Deo praestante aliter perciperent, donationum nostrarum textus ostendant. Superest, ut posteritas eorum ea devotione et fide deserviat, ut augere sibi et servare cica se parentum nostrorum munera recognoscat.

This section illustrates certain important features of such grants: 1) that the holder was required to have a document showing his title to the land, which may suggest that the unwarranted assumption of such lands was not unknown among the Burgundians; 2) that devotion and fidelity are the terms on which the grant is to be preserved by or increased for the heirs of the original recipient, and accordingly the terms on which the grant was made in the first place.

Of still later date is the provision in Const. Extr. XXI, 14:

> Si quicumque aliquid loco munificentiae petire voluerit, cum litteris comitis sui veniat, et consiliarii aut maiores domus, qui praesentes fuerint, ipsas litteras comitis ipsius accipiant, et suas litteras ex nostra ordinatione ad illius iudicis faciant, cuius terreturio res illa, quae petitur, tenetur, et hoc eis concedant, ut diligenter et fideliter requirant, si sine peccatum dare potest.

This section shows in greater detail how such grants were obtained at a later date, and gives some information as to the machinery of the administration of the royal domains.

Since the Burgundian code is the work of the king and embodies changes in the old system in favor of royal power, the privileged classes of the code are composed of persons favored by the king. The references analyzed just above show that it was the practice of the Burgundian kings to give tracts of land to their supporters. It would seem, then, that the possessors of estates given by the king would quite naturally be at the same time those who would

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have a special value before the law; in other words, that they would coincide in the main with the obtimates and mediocres, to whom are assigned higher wergelds than to the freemen as a body.

It becomes necessary to consider in the next place the difference between the obtimates and the mediocres.

The term obtimates occurs in several instances:

> Prima Constitutio A: . . . Cum de parentum nostrisque constitutionibus pro quiete et utilitate populi nostri inpensius cogitemus, quid potissimum de singulis causis et titulis honestati, disciplinae, rationi et iustitiae conveniret, coram positis obtimatibus nostris, universa pensavimus, etc.
>
> Prima Constitutio B, 5: Sciant itaque obtimates, consilarii, domestici et maiores domus nostrae, cancellarii etiam, Burgundiones quoque et Romani civitatum aut pagorum comies vel iudices deputati, omnes etiam et militantes: nihil se de causis his. quae actae aut iudicatae fuerint, accepturos aut a ligitantibus promissionis vel praemii nomine quaesituros: etc.
>
> LIII, 1: . . . postmodum cum obtimatibus populi nostri inpensius de causa tractantes advertimus, etc.
>
> LXXIV, 1: . . . nunc ex ipso eodemque titulo cum obtimatibus populi nostri adtentius universa tractantes, generalitatem praedictae legis placuit temperari.
>
> CV: . . . Nobis vero cum obtimatibus nostris hoc convenit: etc.
>
> Const. Extr. XVIII, 1: . . . cum obtimatibus nostris de re inpensius pertractantes, iustum esse perspeximus, etc.

In all these instances except that in Prima Const. B, 5, the obtimates appear as advisers of the king in the promulgation of laws; in Pr. Const. A they form the council which aids the king in preparing the code, in LIII, LXXIV, CV, and Const. Extr. XVIII they discuss with him the issuing of new laws to meet emergencies not provided for in the former code. Pr. Const. B, 5, is a general warning to all officials who have to do with the judging of cases, that they are not to receive or solicit bribes in regard to such cases as come under their jurisdiction. Of these the first in

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rank are the obtimates. But the term is a general one, and may therefore be supposed to include some of the officials mentioned specifically in the rest of the list. Combining these two aspects of the function of the obtimas, he appears as the highest official and member of the royal council.

It is not possible to determine, perhaps, just what persons would be included in this class. The royal council would comprise not only officials who would be members of the council by virtue of their offices, but also other persons not holding a definite office, such as members of the royal family, Romans versed in law, trusted followers of the king not in office, etc.

The question whether or not the comites would be reckoned among the members of the royal council may deserve more particular study. And first, it must be asked if the expression in Pr. Const. A: "coram positis obtimatibus nostris," is equivalent to the phrase in Pr. Const. B, *2*: "habito consilio comitum et procerum nostrorum." It may be said at least that the words refer to two distinct occasions.[12] The council in Pr. Const. A is that held to consider the selection of laws and the editing of them as a code, while that in B, *2*, is the council held to formulate certain rules to govern the conduct of officials in administering the law (Amore iustitiae, . . . ea primum habito concilio comitum et procerum nostrorum studuimus ordinare, ut integritas et aequitas iudicandi a se omnia praemia vel corruptiones excludat). Moreover, this Pr. Const. is signed by 30 or 31 comites, which would indicate that it was largely their work and directed to them. It appears, therefore, that the two bodies were not the same, although the comites et proceres may have been included among the obtimates.

Title LXXVI, 1, is a provision to correct an abuse complained of by the comites: Comitum nostrorum querella processit, quod, etc.; Const. Extr. XIX and XXI are instructions directed to the comites (XIX, 1. Gundobadus rex Burgundionum omnibus comiti-

[12] This question is bound up with the question of the authorship of the two forms A and B as given in M. G. LL. 4to, I, tom. 2, pars 1. But even if both forms are part of one edition of the law, the fact remains, it seems to me, that "primum habito consilio" must refer to a special meeting at which this preliminary charge to the officials was drawn up. In regard to these two forms see: Savigny, II, pp. 1-3; Gaupp, pp. 300, 301; M. G. LL. 4to, I, tom. 2, pars 1, praef., pp. 9, 10.

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bus; XXI, 1: . . . habito nunc cum comitibus nostris tractatu, praesenti constitutione decernimus, etc.). These instances indicate that whether or not the comites were regularly present at the royal council, at least they had a definite part in the framing of the laws. But when it is considered that these were "comites pagorum aut civitatum" it is evident that they could not be in regular attendance on the royal council; their field of action was the county, and they would scarcely be summoned to attend every meeting of that body. We may safely conjecture, however, that in such case as the editing of a code of laws for the kingdom, mentioned in Pr. Const. A, the comites would form an important part of the council.

But aside from these comites civitatum aut pagorum, there seem to have been other comites, for many of the manuscripts (see the variant readings to line 13, p. 31, of the edition used, M. G., LL. 4to, I, 2, pars 1) insert comites after obtimates, so that the list reads: obtimates, comites, consiliarii, domestici et maiores domus nostrae, cancellarii etiam, Burgundiones quoque et Romani civitatum aut pagorum comites, etc. These are probably the comites palatii, who would undoubtedly be a part of the royal council.

The Roman nobilis, who in title XXVI at least is of the same rank as the obtimas, was probably a member of the Roman senatorial or noble class, in the main great landlords.

We have regarded the obtimates and mediocres as together making up the supporters and beneficiaries of the new monarchy. According to the foregoing conclusions, this party would consist of the royal officials in general and all other persons who for various reasons had received land from the royal domains. Of this general class the obtimates are the higher officials and counsellors of the king. The rest of this royal party, so to speak, would constitute the class of the mediocres, a class whose general characteristic would be the possession of an estate derived from the king. The mediocres would be, therefore, the lower officials, as far as they may be supposed to have held such lands, and the recipients of royal bounty in general. A case in point is the instance already cited in XXXVIII, 6, where "talis persona, quae ex munificentia nostra legatum possit excipere" may be any one of the following persons: the count himself (in which case he would be an obtimas), the representative or subordinate of the count or one of the local representatives of the central administration — these lower officials are perhaps those

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meant by "omnes etiam et militantes" of Prima Const. B, 5 — the heir of a former official not himself in office, or a friend of the king who held an estate in the village.[18]

The conclusions which we have reached in regard to the classes mentioned in titles II, XXVI, and CI may be summed up as follows:

The class whose members are spoken of variously as minores personae, inferiores personae, and leudes, is composed of the ordinary subjects of the law, the free Burgundians, dwelling upon lands which they or their fathers have obtained from the Roman landlords by the terms of settlement, and the small Roman land-holders and citizens.

The mediocres and obtimates together constitute a class which may be termed that of the supporters and beneficiaries of the monarchy. Of these the obtimates are the highest officials of the kingdom and the members of the royal council, while the mediocres make up the rest of this general class, constituting of themselves a class whose general characteristic is the possession of land from the royal domains by gift of the king.

[18] The expression "maiores personae" of sec. 5 is used, as has been suggested already, of those who owned larger estates than the average free inhabitant of the village, but by the same title. It is evident that some among the ordinary freemen may have possessed large amounts of land by means of inheritance from several relatives, etc., but, if the distinction we have made is sound, such persons would not be held in the law as of higher rank than the ordinary freemen, unless they had been drawn into the circle of royal service and munificence.

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38. Si primus Alamannus fuerit, 240 solidos componat aut cum 24 medicus electus aut cum 40, qualis invenire poterit, iuret.

39. Si femina minoflidus fuerit, solvat solidos 320. Si mediana fuerit, solvat solidos 400.

40. Si prima Alamanna fuerit, solvat solidos 480.

The difficulty of interpreting this passage is quite obvious. Accepting the suggestion of Lehmann (p. 23, n. 4) that inclinata, in clita, should read in clida, and refers to a form of torture, the passage may be translated:

33. If anyone has accused the free woman (wife?) of another of the crime of poisoning or dealing in herbs, and has taken her and put her to torture, and any one of her relatives shall have cleared her with 12 compurgators chosen by the accuser, or by wager of battle, let him (the accuser) pay 800 (80?) solidi.

34. If it was a female slave, let him pay 15 solidi.

35. If she has not been tortured and has been taken and tried, let him pay 40 solidi. If she has not been tortured (nor taken and tried, but only falsely accused?) let him pay 6 solidi. And if a man has accused her as guilty and the person in regard to whom she was accused has died, let him who accused the woman pay the wergeld.

36. If it was a man of the minoflidi, let him pay 170 [160] solidi.

37. If it was a medianus Alamannus, let him pay 200 solidi.

38. If it was a primus Alamannus, let him pay 240 solidi, or take oath either with 24 compurgators, chosen by the plaintiff, or with 40 whom he may be able to find.

39-40 give a double wergeld for the woman of each of these classes.

Although it seems impossible to read any sense into the passage as a law, yet the important fact for our purpose is none the less evident. Sections 36-40 define the term wiregildum of 35; whatever the crime may have been for which the wergeld was to be paid, the statement is plain that there were three grades of wergeld: that of the baro de minoflidis, 170 [160] solidi; that of the medianus, 200 solidi, and that of the primus, 240 solidi. This distinction in wergeld is referred to in the section immediately following:

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41: Si quis mortuatus baro aut femina, qui qualis fuerit, *secundum legitimum wiregildum suum* in novegildum solvatur.

The other place in the Pactus where such a distinction in classes occurs is in Frag. III, 20, 21 (repeated in Frag. IV, 15, 16):

20. Si quis mortuum in terra aliena posuerit; 12 solidos solvat aut cum 12 iuret, ut pro hoc malum non fecisset. Si quis ingenuum aut ingenuam ex promissum, cuius fuit, in terra miserit, 40 solidos sit culpabilis. Si servus fuerit, 12 solidos sit culpabilis.

21. Si quis alterius infans minofledis fuerit, 3 solidos componat. Si medianus fuerit, 6 solidos componat. Si meliorissimus fuerit, 12 solidos componat.

This may be translated:

20. If anyone has placed a dead body in another's land, let him pay 12 solidi, or swear with 12 compurgators that he did not do it with wrongful intent. If anyone has placed in the earth a (dead?) free man or free woman, without the permission (ex promissum) of him to whom the land belonged, let him be held liable for 40 solidi. If it was a slave (who was buried), let him be held liable for 12 solidi.

21. If it was an infant minoflidus (who was buried?) let him pay 3 solidi. If it was a medianus (infans?), let him pay 6 solidi. If it was a meliorissimus (infans?), let him pay 12 solidi.

The task of finding the meaning and force of these provisions seems quite hopeless. The conjecture of Lehmann that they refer to burial by pagan rites (p. 32, n. 2), may be correct, but it can be only a conjecture and it fails to explain the difficulties and contradictions. But here, again, the essential fact is clear, that the old Alemannian law made a distinction in classes beween minoflidus, medianus, and meliorissimus (for primus).

The character of the Pactus makes it impossible to arrive at any definite conclusion in respect to the relations of these classes and the basis of distinction. It is so fragmentary and incomplete, so barren of information as to the actual conditions of its period, that we can draw only the most general conclusions.

It may be regarded as certain, however, that these are classes of freemen. The distinction is primarily in regard to the wergeld, a

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term applied in general only to the compensation to be paid for the life of a freeman. Moreover, in the Lex the gradation of wergeld has the form: liber, 160 solidi; medius, 200 solidi. This would correspond to the scale in the Pactus, without the primus, so that the identity of the baro de minoflidis as liber or freeman is quite evident.[3]

But the meaning of these terms as classes of freemen cannot be solved from the material in the Pactus. Only in regard to the baro de minoflidis can any theory be formulated, and that on the uncertain basis of etymology.

The word baro is used in the Pactus for "man"; II, 41: Si quis mortuatus fuerit *baro aut femina;* II, 36: *baro* de minoflidis, and 39, *femina* minoflidis; II, 32: Si *femina barone* extra rixa subdulo clamaverit.[4]

The term minoflidis occurs in Lex Salica LXXIV: De hominem inter duas villas occisum, where the inhabitants are to swear to their innocence in this way: "Those of higher rank shall clear themselves with 65, but the minoflidis shall furnish 15 compurgators" (vicini . . . qui meliores sunt cum sexageno quinos se exuent . . . minoflidis vero vicini quinos denos juratores donent). The term here has been interpreted as the small free land-holder.[5]

On this ground we may understand the term minoflidus to mean the small land-owner, the ordinary freeman. The fact that in Lex

[3] It is safe at the present stage of criticism to discard without argument the labored attempt of Merkel (M. G. LL. folio, III, p. 36, n. 64) to account for the disappearance of the primus in the Lex by a change in the coinage. He assumes that the solidus of the Pactus contained two tremisses, while that of the Lex, under Frankish influence, was made up of three, and works out the following equation:

160 $solid_s$ = 320 tremiss = 106 ⅔ $solid_s$.
240 $solid_s$ = 480 tremiss = 160 $solid_s$.

whereby he seeks to show that the primus of the Pactus is the liber of the Lex, while the baro de minoflidus is the litus. See Lehmann, N. A., X, p. 472.

[4] See Diez, Etymologisches Wörterbuch, s. v. *Barone.*

[5] Clement-Zöpfl, Forschungen über das Recht der salischen Franken, pp. 261, 262: "minoflidis, d. h., den geringeren Leute in kleinen Behausungen (von min, wenig, klein, und flid, altfris. und alteng. Flet, nordeng. und schott. flet, d. i. Haus, Insassenwohnung in einem Hause)." Brunner, D. RG., I, p. 249: "Das Wort minoflidus ist niederdeutsch und bedeutet der Besitzer eines geringeren Hofes"; and n. 15: "Flid, alts., ags. und altn. flet, ahd. flezi, flazi area, aula."

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Sal. LXXIV the meliores were to furnish 65 and the minoflidis 15 compurgators has been taken to indicate that the former were to be responsible for their tenants or dependents, and the conclusion has been drawn that the distinction was here between simple householders and landlords of great estates with free or unfree tenants.[6] But arguments from etymology are notoriously dangerous, and quite opposite conclusions have been drawn in many cases from the same derivation.[7]

On the whole then the only safe conclusion is that the Pactus recognized three classes of freemen as having different values for certain legal purposes, and that these were known to the time of the Pactus as minoflidi, mediani, and primi (or meliorissimi).

LEX ALAMANNORUM.

The Lex is, on its face, a very different sort of document from the Pactus. It is an attempt at a systematic codification of the existing Alemannian law, based upon the primitive folk law and including regulations to meet the new situation. There is a conscious effort at division of material; the matter falls into three parts, relating respectively to the church, to the duke, and to the private subject; or into ecclesiastical, public, and private law. Titles I-XXII deal with ecclesiastical affairs; XXII-XLIII with public affairs, under the heading "De causis quae ad duce pertinent;" XLIV-XCVIII[8] with private affairs, under the heading "De causis qui saepe solent contingere in populo."

The only reference to a distinction in classes in the Lex is found in title LX:

> 1. Si quis autem liber liberum occiderit, conponat eum bis octuaginta solidis ad filios suos. Si autem filios non reliquid nec heredes habuit, solvat eum 200 solidis.
>
> 2. Feminas autem eorum semper in duplum.

[6] Heusler, Institutionen, p. 162 f.

[7] In this case, for example; see Herrmann in Gierke's Untersuchungen, 17, p. 101: "Die Minofliden waren durchgehends angesiedelt in markgenossenschaftlichen Villae; . . . der Plural de mino flidis soll also so viel sagen wie: von grundherrlichen Dorfe."

[8] Titles XCII-XCVII contain the fifth Fragmentum of the Pactus which Lehmann repeats here as it occurs in the manuscripts.

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3. Medius vero Alamannus si occisus fuerit, 200 solidis solvat eum parentibus.

The only difficulty in this title is in the second sentence of section 1: Si autem filios non reliquid, etc. The explanation doubtless lies in the fact that in the case the slain man left no heirs the payment would go to the fisc. In that case the 200 solidi = the wergeld of 160 solidi + the fredus of 40 solidi.[9]

The same wergeld for the liber is given in XLV:

> Si quis liber liberum extra terminos vendiderit, revocet eum infra provintiam et restituat eum liberatem et cum 40 solidis conponat. Si autem eum revocare non potest, cum wirigildum eum parentibus solvat, id est bis octuaginta solidos, si heredem reliquit; si autem heredem non reliquit, cum 200 solidis componat.

The fact has been mentioned that these two classes correspond to the two lower classes of the three-fold division of the Pactus in such a way that liber is the same as baro de minoflidis and medius is the same as medianus. The primus or meliorissimus has disappeared, but the persistence of the term medius would suggest the existence of some still higher class.

The term liber occurs frequently in the law, and there is thus some material to work on in attempting to determine the force of the expression when used of the member of a class. But the word medius does not appear in any other passage than the one quoted;

[9] The fredus of 40 solidi is mentioned in III, 3; . . . conponat 36 solidos ad ecclesiam et fredo solvat in fisco 40 solidos, quare contra legem fecit et ecclesiae honorem non inpendit et Dei reverentiam non habuit, etc.; and in XXX: Si quis in curte regis furtum alicui fecerit, dupliciter conponat, cui furtum fecit, et 40 solidos pro fredo in publico solvat; but the case appears very clearly in IV, where the freeman who slays a freeman within the doors of a church must pay 40 solidi to the church as compensation for the pollution, and the fredus to the fisc, and the legal wergeld to the relatives of the slain man. In this case the size of the fredus is not given but it is evidently understood to be 40 solidi; here, then, we have it stated that the fredus and the wergeld are both paid in the case of slaying a freeman. This fredus must be understood in XLV (see below) and in LX, the sum of the wergeld and fredus being mentioned in the case where there are no heirs because the two fall together in that case to the fisc. This is suggested in the note of Lehmann to XLV (p. 106, n. 3: "Sc. fisco. Summa 200 solidorum ex 160 solidis weregeldi et 40 solidis fredi composita est.").

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the determination of the character of that class, therefore, will have to be based upon more general conclusions.

As it is used in the Alemannian law liber clearly means the ordinary freeman, the regular Alemannian subject. The usual method of beginning a title or a section is "si quis . . . ," and the following forms of this occur: si quis liber, si liber, si quis, si quis homo, si quis aliquis homo, si homo; all these terms are used in such a way as to show that they are interchangeable and synonymous. So also the expressions liberum hominem, aliquem, and alium are used in speaking of the injured, and in III, 1, occurs the expression aliquem . . . aut liberum aut servum. This is sufficient to show that the liber in the Alemannian laws is the free Alemannian, the ordinary legal subject. It is in this sense that the wergeld of the liber is mentioned incidentally in XLV to define the compensation to be paid in that case, and it must have the same meaning in LX, where the wergeld of the liber is mentioned along with that of the medius.

That this liber has retained his political rights is evidenced by title XXXVI, which deals with the assembling of the hundred court, but the right of attending this assembly has evidently become a burden rather than a privilege, so that a fine is fixed for the neglect of attendance by the liber (Si quis liber ad ipsum placitum neglexerit venire . . . 12 solidos sit culpabilis).

In order to discover as exactly as possible the status of the freeman in the Alemannian law, it will be necessary to study his economic position, as far as that can be determined from the code.

Titles I and II are very suggestive on this point, and deserve careful attention:

> 1. Ut, si quis liber res suas vel semet ipsum ad ecclesiam tradere voluerit, nullus habeat licentiam contradicere ei, non dux, non comes nec ulla persona, sed spontanea voluntate liceat christiano homine Deo servire et de proprias res suas semet ipsum redimere. Et qui voluerit hoc facere, per cartam de rebus suis ad ecclesiam, ubi dare voluerit, firmitatem faciat, etc.
>
> 2. Et si aliqua persona aut ipse, qui dedit, vel aliquis de heredibus eius post haec de ipsas res de illa ecclesia abstrahere voluerit, vel aliquis homo, qualiscumque persona hoc praesumpserit facere, . . . affectum, quod in-

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choavit, non obteneat et multa illa, quae carta contenit, prosolvat, etc.

II, 1. Si quis liber, qui res suas ad ecclesiam dederit et per cartam firmitatem fecerit, sicut superius dictum est, et post haec a pastore ecclesiae ad beneficium susciperit ut victualem necessitatem conquirendam diebus vitae suae, et quod spondit prosolvat ad ecclesiam censum de illa terra, et hoc per epistulam firmitas fiat, ut post eius discessum nullus de heredibus non contradicat; etc.

This passage is of interest first as showing one of the means employed by the church to increase her wealth and power. The endowing of ecclesiastical institutions with land by the powerful and wealthy, kings and nobles, is a common phenomenon in this period. Such lands were given from the royal domains or from the great estates of the nobles, and were cultivated by coloni, whose presence on church lands is shown by titles VIII and XXII:

VIII. Si quis autem liberum ecclesiae, quem colonus vocant, si occisi fuerint, sicut alii Alamanni, ita conponant.

XXII. De liberis autem ecclesiasticis, quod colonus vocant, omnes sicut et coloni regis ita reddant ad ecclesiam.

But titles I and II are concerned with the ordinary freeman who "of his own free will" desires to give his land to the church "in order to redeem himself." Title II provides for the case where the freeman who thus gives up his property may receive it back "ad beneficium" at a fixed rent (et quod spondit prosolvat ad ecclesiam censum de illa terra). A fine is also fixed for the attempt of the heirs to break the gift (ille praesumptor, qui contradixit, illa multa, quod carta continet, ad ecclesiam prosolvat). Such a deed of gift would include the grant, describing the land given, the terms on which the donor should hold it "ad beneficium," *i. e.*, the censum, and the fine to be paid for contesting the grant. And just such cartae are found in the formulæ of Augsburg and St. Gall, both of which are in the old Alemannian territory.[10]

[10] The best example is no. 6 of Form. Aug. B, M. G. LL. 4to, V, Form., p. 351: "Carta traditionis, quam fecit homo et vult, ut infantes eius habeant post se cum censu. Ego in Dei nomine ill. Conplacuit mihi in animo meo, ut aliquid de rebus meis pro remedio animae meae condonare deberem; quod ita et feci. Et hoc est quod trado: . . . In ea ratione videlicet, ut, quamdiu

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The position of such free tenants was quite distinct, both in nature and origin, from that of the coloni of the church. The coloni were bound to the soil; their rent was fixed by law (legitimum tributum), although the amount of this rent is not stated in the law (XXII, 1: . . . omnes sicut et coloni regis ita reddant ad ecclesiam); they had moreover to furnish such services as the landlord might require (opera, quidquid eius inposita fuerit secundum mandatum). The free tenant paid merely the rent fixed in the document and was apparently free to leave the land. But from the point of view of the landlord the difference would not be very great; both free tenants and coloni held land which belonged to the church; both paid rent which made up the income of the estates of the church. The difference in origin and in freedom of movement of the free tenants would become less and less as association with their fellow-tenants, the coloni, was continued, and as the distance from their free origin was widened. The attempt of the clerical landlord would be to reduce his tenants, free and coloni, to the one condition. This appears very clearly in title VIII, quoted above, where the coloni of the church lands were to be paid for "sicut alii Alamanni." But that the distinction was not entirely lost appears from LV, which deals with the case of two sisters, one of whom marries a "quoequalem liberum," and the other "aut colonum regis aut colonum ecclesiae:"

> Illa enim, qui illum colonum nupsit, non intret in portionem de terra, quare sibi quoequalem non nupsit.

mihi vita comitatur in corpore, superius denominatas res in beneficium a vobis accipiam sub usu fructuario debitumque censum singulis annis vobis successoribusque vestris prosolvam, id est tantum: filiusque meus ipsas res habeat diebus vite suae tantummodo et supradictum censum prosolvat. . . . Si quis vero . . . istius traditionis firmitatem corrumpere voluerit . . . pro ausu temerario prosolvat ad prefatum monasterium duplum tantum, quantum malo ordine cupiditate praeventus abstrahere voluerit;" etc. A similar carta is no. 14, Form. Sang. misc., LL. V, Form., p. 385; here the donor is to receive in addition "unam hobam de rebus ipsius monasterii in supradicta villa in beneficium," and the one who contests the gift is to pay "ad aerarium regis auri uncias 3 et argenti pondera 5." See also no. 15 of this collection, and nos. 14–16 of the Form. Aug., and no. 45, Addenda ad Form. Aug.; in regard to such cartæ in general see Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunden, pp. 288-302. These formulæ were, of course, taken from actual documents, and the close parallel between the formulæ and the titles quoted would indicate that both referred to the same process.

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Titles I and II show not only this process of giving land to the church on the part of the freeman, but suggest as well an opposition to the movement (nullus habeat licentiam contradicere ei, non dux, non comes nec ulla persona). The reason for this opposition is not far to seek. Such land taken by the church would be withdrawn from bearing its share of the public burdens. Moreover, the secular landlords were doubtless learning the advantage of this process, and their attempt to take part in it would conflict with the efforts of the church.

Still a third conclusion may be drawn from these titles. However far this process of giving up free holdings had gone at this time, there must have still existed a certain amount of such lands in the hands of the liberi. In what proportion these free holdings had maintained themselves cannot be determined from the law. They must have existed, however, in sufficient quantity to make it important for the church to provide for the continuance of the process.

The position of the liber is still further illustrated by title XXXVI:

> 1. Ut conventus secundum consuetudinem antiquam fiat in omni centena coram comite aut suo misso et coram centenario. . . .
>
> 3. Si quis autem liber ad ipsum placitum neglexerit venire vel semetipsum non praesentaverit aut comite aut centenario aut ad missum comiti in placito, 12 solidos sit culpabilis. Qualiscumque persona sit, aut vassus duce aut comite aut qualis persona, nemo neglegat ad ipsum placitum venire, ut in ipso placito pauperi conclamant causas suas. . . .

This "conventus" held "according to ancient custom in every hundred" is evidently the Germanic hundred-court, the "mallus legitimus" of Lex Salica, the "hundred-gemot" of the Anglo-Saxon laws.[11] The character of this assembly has changed, however, from the primitive situation. The assembly was held as formerly in each

[11] If, as seems likely, the centenarius is meant by the iudex of title XLI, 1: Ut causas nullus audire praesumat nisi qui a duce per conventionem populi iudex constitutus sit; then the centenarius here would correspond closely to the princeps of Tacitus (the hundred-man): Germ. 12: eliguntur in isdem conciliis et principes, etc. See Waitz, D. VG., II, 2, pp. 147-151.

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hundred, and the ordinary freemen are the regular attendants, but in place of the elected hundred-man the comes is now the head, and either presides himself or sends his missus to represent him. This comes is the royal official who represents the king in the county comprising several hundreds. By his side in the hundred-court is the centenarius, the descendant of the old hundred-man, or "thunginus," as he is called in the Salic law, now reduced from his former position to one of subordination to the royal officer.[12]

In sec. 3 of this title, after the requirement that every freeman shall attend the conventus in his centena, there occurs the sentence: Qualiscumque persona sit aut *vassus duce aut comite* aut qualis persona, nemo neglegat ad ipsum placitum venire. Here the vassus of the duke or of the count is expressly included among the freemen. This seems to be the earliest use of the word in this sense; in the Merovingian documents in general vassus means an unfree servant.[13] It is perhaps not possible to say just what is the relation of the free vassus to his lord at this time, but it seems likely that it would correspond to the relation of the vassus or vassalus in the Carolingian period. The later use of the word is in the sense of one who has entered the service of a powerful lord by "commending himself."[14]

[12] The general line of this development, which has been suggested already in the Introduction, may be indicated from the sources briefly thus: The first stage is the primitive situation as shown by Tacitus (the familiar Germ. 12, "eliguntur in isdem concillis," etc.; in regard to which see especially Waitz, I, ch. 7, "Die Fürsten"), where the principes elected in the general tribal assembly preside over the assembly in each hundred within the tribe; the second appears in the Salic law, where the regular presiding officer in the hundred-court, the "mallus legitimus," is the "thunginus aut centenarius," but where the graf, the royal representative in the county, is also present to watch after the king's share of the court fines, and where he appears as the executive officer to be appealed to in case the delinquent has refused to obey the finding of the court after all the legal delays have elapsed (Lex Sal., XLV, L, etc.). The third is represented by this title in the Lex Alam., and by the Frankish system in use at this time, where the comes had become the regular presiding official of the various hundred-courts in his county, and the centenarius occupies a subordinate position.

[13] Lex Sal. XXXV, 6; Form. Marc. II, no. 17 (M. G. LL. 4to, V, p. 87); Roth, Benef., pp. 367 ff; Waitz, D. VG., II, 1, pp. 259, 260.

[14] Roth, *l. c.*, p. 367; Waitz, *l. c.*, p. 260: "Der spätere Sprachgebrauch, der das Wort nur da verwendet wo eine Commendation stattfand, lässt darauf schliessen, dass ein solches Verhältnis auch hier anzunehmen ist."

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the descendants of such tribal nobles are to be included among the medii.

In the next place, it seems that the medii are not the chief officials. In that portion of the code which is devoted to the position and authority of the duke, there are several titles which accord a three-fold protection to the belongings and the surroundings of the duke: the peace of the army called together by the duke (XXVI, 2), the peace of the duke's court and the duke's business (XXVIII), and the possessions of the duke (XXXI). Title XXIX reads:

> Si quis missum ducis infra provintia occiderit, tripliciter eum solvat, sicut lex habet; etc.

The same protection is given to the man coming from or going to the duke (hominem de duci venientem aut ad illum ambulantem). If this is true of the man casually employed upon the duke's business it certainly would be true of those who were intrusted, by virtue of their office, with the duke's affairs, of the comites, the duke's representatives in the counties, of the officials of the central administration, the members of the duke's court. Then the phrase in XXIX, referring to the missus, "tripliciter eum solvat, sicut lex habet," would be equivalent to "legitimum wiregildum tripliciter solvat," and would refer to the distinction between the wergeld of the liber and that of the medius, so that the liber engaged in the service of the duke would have a wergeld of 480 solidi and the medius a wergeld of 600 solidi. Here may be seen the influence of the Frankish antrustiones, who were given a three-fold wergeld because of their importance for the royal service.

This would account for the disappearance of the primus of the Pactus. If at that time the medianus held the same position as the medius of the Lex, the primus may have been the chief official, as the obtimas of the Burgundian law and the primus of the Lombard code. But with the introduction of the Frankish practice of trebling the wergeld of the antrustio, the officials would cease to be a distinct class, each individual in that relation having a special pro-

possess a double wergeld, and the fact is expressly mentioned that this exalted value is due to the special honor in which these families are held (Illis enim duplum honorem concedimus. Et sic duplam compositionem accipiant.). Brunner, RG., I, p. 250, however, regards the medii alamanni as descendants of the former tribal nobles.

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tection of three times his legal wergeld. This would explain also why the medi would appear as the highest class named in the law are yet regarded as intermediate between the simple freemen and some still higher rank.[18]

Returning to the medii, we have come so far as to conclude that they represent a class standing between the freemen and the chief officials of the duchy, and further that their position is not based upon noble descent or holding of royal office. With regard to these conclusions and with regard to the character of the society as shown in the law, the natural hypothesis is that the distinction is based upon land-holding — evidently a factor of great importance in the Alemannian state. According to this hypothesis the medii Alamanni would be the landlords upon whom the ordinary freemen were becoming dependent, those who owned large estates requiring tenants to cultivate them, those whose position and the extent of whose establishments would give employment to free servants and retainers.[19]

There is definite evidence in the law that among these landlords were included the counts and the church, for the free vassi who also must attend the conventus are especially the "vassi ducis aut comitis," and it was of the church especially that the freemen were becoming tenants. Among the medii, therefore, should be included the counts and the church dignitaries.[20]

[18] Among such officials would doubtless be included the principes populi of title XXIII: Si quis aliquis homo in mortem duci consiliatus fuerit et exinde probatus, aut vitam det aut se redimat, sicut dux aut [et] principes populi iudicaverint. These principes seem to be the personal advisers of the duke or the members of his council, which cannot be the conventio populi of XLI.

[19] The first analogy to suggest itself might be the wergeld of 200 solidi which the free Frank enjoyed, but this can be definitely rejected. There is no mention of the Frank in the law, the Alemannian duke appears as a monarch almost entirely independent of the Frankish king, and finally the expression "medius Alamannus" is conclusive in restricting this class to the Alemannians.

[20] It would appear, in fact, that the clergy as a class were reckoned among the medii, for the scale of wergelds among them was evidently arranged on a basis of 200 solidi. Thus in XII the presbyter parochianus is to be compensated for any injury "in triplum . . . et si eum occiderit, 600 solidos eum conponat"; in XIII, "diaconus, qui euangelium coram episcopum legit," is to be compensated for injuries "dupliciter; . . . et si eum occiderit, 300 (al. 400) solidos componat" (several manuscripts read 400,

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But if the characteristic of the medii as a class is the possession of large estates in contrast to the simple freeholds of the freemen, this class must include more than the counts and the clergy; it must be a general class.

In determining the sources of this class of landlords it will be necessary to recall the general outlines of the history of the Alemanni. The name occurs first in the reign of Caracalla,[21] and the confederation must have come into existence about the beginning of the third century. At this time the Alemanni, composed of a number of tribes, chief of whom were the Tencteri and the Usipii,[22] occupied the region about the Main, from which point during the third century they made repeated attacks upon that triangle of Roman territory between the Rhine, the Danube, and the Limes, known as the Agri Decumates. By the end of the third century they had won a permanent foothold within this territory. From

which should be the correct reading, as 300 solidi is not the double of any wergeld in the Alemannian law); in XIV, "monachus, qui sub regula in monasterio conversatus fuerit," has the same compensation as the diaconus; in XXV, the clerici in general are to be compensated "sicut ceteri parentes eorum," while the "clericus qui in gradu in ecclesia publica lectionem recitat" is to be compensated "quomodo parentes eius, . . . et tertia pars super haec addatur." These last two cases may seem to indicate that the wergeld of the liber, to which the "ceteri parentes" of the lower clergy would probably belong, was the basis used for them, but the form of the statement in XV, 1, 2, does not specify killing, but includes injuries in general, and refers to the list of fines for injuries in the law, a list based entirely on the liber (see title LVII). In the case of slaying it seems probable, from the instances of the priest, deacon, and monk, that the compensation here too would be based on a wergeld of 200 solidi. The episcopus is not included among these examples, because his wergeld is not given in figures. After stating that all injuries to the episcopus are to be paid for "tripliciter," title XI continues: "et si occisus fuerit, sicut et illum ducem ita eum solvat aut rege aut duce aut ad ecclesiam, ubi pastor fuit." But the duke was protected even against a plot by providing a penalty of death or an indeterminate fine for the one who conspired against him (title XXIII), while no compensation for his killing is given.

[21] Aelii Spartiani Antoninus Caracalla, c. 10 (Scriptores Historiæ Augustæ, I): "nam cum Germanici et Parthici et Arabici et Alamanni nomen adscriberet (nam Alamannorum gentem devicerat)," etc.; Zeuss, Die Deutschen, p. 304; von Wietersheim, Geschichte der Völkerwanderung, p. 157.

[22] Zeuss, p. 305. The origin of the name Alamanni is given in Agathias, I, 16 (Corpus Scriptorum Historiæ Byzantinæ, III).

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this vantage ground they made many inroads and raids further within the empire, gradually extending their possessions southward, until at the beginning of the fifth century they joined in the general attack upon the Roman boundaries and spread over the Rhine into Elsass (Ali-satz).

The Roman writers who give the details of the spread of the Alemannian tribe mention the fact that they appear under several kings (reges, reguli, subreguli); at one time nine are mentioned, at another as many as fourteen. In time of war the leadership seems to have been sometimes intrusted to one or two kings, but there is no evidence that such kings possessed any rights of overlordship in time of peace. By the time of Chlodovech the tribe appears to have come under the rule of a single king. It seems probable that the dukes of the Merovingian period were descended from this royal line.

During the course of the occupation of territory by this confederation of tribes, the kings of each tribe would come into possession of large tracts of land as a result of the conquest. This would be true also of others who were in a position to take advantage of the new situation, the followers of the kings and the tribal nobles. Thus the foundations of large landholdings would be laid in this early period. As the amalgamation of the tribal confederation into a state was probably a development and not a revolution, such hereditary possessions would not be disturbed in the change. Even the ordinary free warrior might under favorable circumstances create for his descendants an inheritance which would overshadow the simple freehold. So at the time of the appearance of the tribal dukes there would be in existence a number of families whose possessions would be far greater than the average portion of the freemen, who, however, would not constitute a distinct class.

This number would be greatly increased by the organization of the administration of the duchy. Whether or not the later duke was the descendant of the tribal king, it is evident that at the time of the law the Alemannian duke was a monarch independent, within the duchy, of the Frankish king. From the analogy of the other Germanic states it may be supposed that the Alemannian dukes used their possessions in establishing the personal administration which we find in the law. The fact that the comites as well as the

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duke are regarded as regularly having vassi under them would indicate that they at least were beneficiaries of the duke.[28]

The possessors of such domains would gain in importance as the simple freemen declined in political significance and economic independence. By the beginning of the eighth century the democratic form of government, with an elected monarch and free assemblies presided over by elected leaders, had given place to the monarchical and aristocratic administration in which the monarch was the hereditary duke and the regular administrative officers were the comites appointed by the duke. The hide of the freeman, the former basis of political and economic society, had in a measure given way to the tenant farm on the large estates, and where it still existed it was overshadowed by the large possession in the hands of the wealthy landlord, organized into a domain with a central estate and dependent holdings. The landlords of such domains were beginning to assume the functions of the state in creating a private jurisdiction for their tenants and followers and building up a corporate society within the domain. In the generations of existence there had developed a contrast between such estates and the simple freeholds and a feeling of the semi-public value of the greater estates, that would readily account for the legal advantage accorded to the land-holding class.

It must be admitted that this conclusion as to the nature and meaning of the medii as a class is only a theory, but it seems to be the theory most consistent with the statements of the law, with the character of the Alemannian society portrayed there, and with the history of the Alemannian tribe.

The conclusions at which we have arrived in this study may be summed up as follows: The Lex Alamannorum mentions two classes of freemen, liberi with a wergeld of 160 solidi and medii

[28] The discrepancy in the conclusions reached in this case in regard to the origin of the medii and in the Burgundian law in regard to the origin of the mediocres is to be explained by the difference in the manner of the settlement as well as in the time of the laws. Here the tribe had gradually expanded and gradually developed its institutions as it grew; there the Burgundians had been transplanted onto Roman soil and developed under Roman influences. The Alemannian law appears in the eighth century, when the landed class had had an opportunity to develop a distinct character; the Burgundian law appears at the beginning of the fifth century, when the dependence of the new nobility upon the king was still very intimate.

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with a wergeld of 200 solidi. The liberi are the simple freemen, to a certain extent the tenants and vassi of the landlords, ecclesiastical and secular, but to a certain extent also free land-owners. The medii are the owners of large estates coming from various sources, who have developed into a distinct land-holding class, and upon whom the freemen are becoming dependent. The chief officials are appointed by the duke and enjoy the special protection of a wergeld three-fold that of the official members of the classes from which they are drawn.

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CHAPTER III. THE LOMBARD CODE.

The Edictus Langobardorum is one of the most interesting and important of the Germanic codes. It is the most extensive and complete single body of law issuing from a Germanic tribe (unless we except the Leges Visigothorum, the extent of which is due principally to its verboseness); it is characterized by a legal sense, a feeling for logic and consistency quite remarkable among the tribal laws;[1] it has preserved its Germanic character, especially in Rothari's Edict, to an unusual extent, considering the location of the Lombard kingdom in the heart of the old Roman empire;[2] and it had a more enduring existence than any other of the Germanic laws, being studied in Bologna in the fourteenth century, and persisting in Bergamo until 1451.[3]

We are not left in doubt as to the time of the various parts of this code, each section being dated in the prologue by the year of the king under whom it appeared. The Edictus Langobardorum is made up of the fundamental law, the Edictus Rothari, issued by Rothari in the eighth year of his reign (643), consisting of 388 titles; additions to this given by Grimoald of nine titles in 668, by Liutprand of 153 titles at various times from 713 to 735, by Ratchis of 14 titles in 746, by Aistulf of 22 titles in the years 750 and 755.

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[1] Brunner, D. RG., I, p. 369: "Rotharis Edikt ist mit Recht als die hervorragendste legislative Schöpfung aus der Zeit der Volksrechte bezeichnet worden. Ein Werk aus einem Gusse ist das Edikt frei von dem kompilatorischen Charakter der meisten Volksrechte. Die Rechtssätze sind knapp und scharf formuliert. Der Stoff ist nach bestimmtem Plane verteilt."

[2] Bethmann–Hollweg, Der germanisch-romanische Civilprozess im Mittelalter, I, pp. 325 f: "Denn im Ganzen enthält das Gesetzbuch rein germanisches Recht. . . . Römische Rechtssätze, die in den langoboardischen Gerichten schon Eingang gefunden oder durch das Gesetzbuch eingeführt werden sollten, finden sich darin nur in geringer Zahl."

[3] Savigny, Gesch. d. röm. Rechts im MA, II, p. 214-215.

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The fundamental law of Rothari is itself a collection made from former law, as appears from the prologue:

> Ob hoc considerantes dei omnipotentis gratiam, necessarium esse prospeximus presentem corregere legem, quae priores omnes renovet et emendet; etc.

But these "former laws" were apparently the unwritten law of the Lombards. Title 386, which is a summary or conclusion of the Edictus, reads:

> 386. Presentem uero dispositionis nostrae edictum, — quem deo propitio cum summo studio et summis uigiliis a celestem faborem praestitis, inquirentes et rememorantes antiquas legis patrum nostrorum (*quae scriptae non erant*), condedimus, et, quod pro commune omnium gentis nostrae utilitatibus expediunt, pari consilio parique consensum cum primatos iudices, cunctosque felicissimum exercitum nostrum augentes constituimus — in hoc membranum scribere iussimus; etc.

In the Lombard code the only definite division of classes of freemen occurs in a law of Liutprand of the year 724:

> 62. VIIII. Reminiscimur enim, qualiter iam statuimus: qui hominem liberum occiserit, ut res suas in integrum perdat; et qui se defendendum hominem occiserit, conponat secundum qualitatem personae. Nunc autem statuere preuidemus, quomodo sit ipsa qualitas consideranda. Consuitudo enim est, ut minima persona, qui exercitalis homo esse inuenitur, centum quinquaginta solidos conponatur, et qui primus est, trecentos solidos. De gasindiis uero nostris uolumus, ut quicumque minimissimus in tali ordine occisus fuerit, pro eo quod nobis deseruire uedetur, ducentos solidos fiat conpositus; maioris uero secundum qualis persona fuerit, ut nostra consideratione, uel successorum nostrorum, debeat permanere, quomodo usque ad trecentos solidos ipsa debeat ascendere compositio.

This gives then the scale of wergeld for classes of freemen (qui *hominem liberum* occiserit) as follows: for the minima per-

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sona, or exercitalis,[4] 150 solidi; for the primus, 300 solidi; for the gasindii of the king, 200 to 300 solidi, according to their value in the royal service.

This title deserves more minute analysis. The first sentence: Reminiscimur enim, qualiter iam statuimus: qui hominem liberum occiserit, etc., refers back to Liut. 20:

> 20. II. De homicidium. Si quis liber homo se defendendum liberum hominem occiderit, et si prouatum fuerit, quod se defendendum ipsum hominem occisessit, sic eum conponat, sicut in anteriore edicto contenit, quod gloriose memorie rothari rex facere uisus est. Nam qui super alium ambolauerit, et sic eum pro quacumque causa occiserit, omnem substantiam suam amittat et habeant heredis ipsius qui occisus fuerit, etc.

Comparing this with title 62 above, it appears that "conponat secundum qualitatem personae" of 62 has the same meaning as "sic eum conponat, sicut in anteriore edicto contenit, quod gloriose memorie rothari rex facere uisus est," of 20. The Edictus Rothari, however, in no place gives the value of the wergeld; the term "uuergild" occurs several times in the Edictus, and along with it a barbarous term, having apparently the same meaning; moreover, it appears that in the Edictus the wergeld of the freemen varied; thus we find in Ed. Roth. 11: conponat ipsum mortuum sicut adpretiatus fuerit, id est uuergild; 48: pro mortuum adpretietur, qualiter in angar-gathungi, id est secundum qualitatem personae; 74: conponat, qualiter in angar-gathungi, id est secundum qualitatem personae (all these cases refer expressly to freemen).

In the light of this fact the next part of title 62 ("Now, however, we see fit to declare how this *qualitas* is to be regarded. For it is the custom that," etc.) seems to refer directly to this silence on the part of Rothari's edict as to the value of the different wergelds. "Consuitudo," then, would mean the "custom" in the time of Rothari. But if it refers back to the value of the wergeld under-

[4] This interpretation of "minima persona, qui exercitalis . . . et qui primus," is, I believe, more in agreement with the sense of the law than the interpretation of Hegel (Geschichte der Städteverfassung von Italien, I, p. 394) and Bethmann-Holweg (I, p. 320, n. 89), both of whom would understand exercitalis after primus, and make the distinction refer to classes in military service.

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stood by Rothari in using the expression "secundum qualitatem personae," it must go still further back to the value as it was known in the unwritten laws upon which the Edictus was based. We may trace the history of this title, therefore, through the following stages: The customary Lombard law in force before Rothari recognized two classes of freemen, one having a wergeld of 150 solidi, the other of 300 solidi. The compilers of the Edictus Rothari maintained the distinction in regard to wergeld, but neglected to state the values of these wergelds; the Edictus also provides that he who slays another while defending himself shall not be required to pay the wergeld (Roth., 280: . . . non requiratur, quia ille qui eum occisit, se defendendum et res suas uindicandum hoc egit). Then Liutprand considered it wise to amend this provision by title 20 to read that he who has slain a freeman while defending himself must pay the wergeld as it was fixed in the edict of Rothari, while he who has attacked a freeman and has slain him shall lose all his property, from which the wergeld shall be paid to the heirs and the rest divided between them and the royal treasury; if his property is less than the wergeld his person shall be handed over to the relatives of the freeman who was slain. Then in title 62 Liutprand desires to add to the classification of freemen already understood a new class made up of the royal gasindii; the fact probably was discovered that the former laws neglected to give the value of the wergelds of the classes already recognized in the law; this occasion was taken to state these values, referring to them as "consuitudo," and to add the new class which it was desired to recognize.

We have, therefore, to determine as far as possible the position which these three classes, the minimae personae or exercitales, the primi, and the gasindii of the king, held at the time of Liutprand.

It seems best for this purpose to begin with the gasindii of the king, who, as forming a definite class, may be studied and defined and then more or less confidently set aside. The general meaning of the term gasindius may be sought by studying the instances of its use in the Lombard law, its origin and derivation, and the meaning of this and related words in other laws; we may then attempt to apply it to actual persons found to exist in the Lombard code.

First, then, the appearance of the word in the laws of the Lombards, and immediately in the title 62 which has been quoted.

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According to this the gasindii of the king hold a position intermediate between the minima persona and the primus, in such a way that the lowest member of this order (ut quicumque minimissimus in tali ordine) has a wergeld of 200 solidi and the more important in an ascending scale up to 300 solidi. The reason for their possession of a high wergeld is said to be "on this account, because he seems to be of service to us" (pro eo, quod nobis deseruire uedetur), and the higher values given for the more important members of this class is governed by the position they hold in "our consideration or that of our successors." It is his relation to the king, therefore, his value in the royal service, that gives the gasindius his favored position.

The instances of the use of the term in other parts of the Lombard law are few and give little definite information. They are as follows:

> Roth, 225. De filiûs libertis. . . . Et si alequid in gasindio ducis, aut priuatorum hominum obsequium, donum munus conquisiuit, res ad donatore reuertantur.

Here *gasindium* ducis is used of the office, corresponding to priuatorum hominum *obsequium.*

> Ratchis 10 (a. 746): . . . Violentia quidem, si sustinuerit aliquid aut a iudicem suum, aut ab alium hominem, et iudex neglexerit iudicare, forsitan adtenderit ad gasindium, uel parentem, aut ad amicum suum, uel ad premium, et legem non iudicauerit; tunc veniat ad palatio, et reclamit sua violentia; etc.

Here *gasindium* is the accusative of gasindius, the person, coördinate with parentem, amicum suum. The iudex must have been guilty at times of favoring his gasindius at the expense of strict justice; the gasindius was, therefore, some one in a close personal relation to the iudex, but as he was neither a "relative" nor a "friend" his relation to the iudex would seem to have been one of personal dependence.

> Ratchis 11: . . . Si enim quiscumque liber homo in servitio de gasindio regis, aut eius fidelis introierit, et iudex, de sub quem fuerit, dolose eum obpremere quesierit,

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pro eo quod ipse in alterius seruitio introiuit, et per ipsum dolum inlecite ei iudicauerit, et forsitans ab ipso iudice suo iustitia inuenire non potuerit: tunc componat iudex sicut supra legitur, et ille in cuius obsequio est, habeat licentia causam eius agere, et usque ad legem perducere; etc.

Ratchis 14: De gasindiis quidem nostri ita statuere, ut nullus iudex eos opremere debeant, quoniam nos debemus gasindios nostros defendere. Et si contra lege aliquid faciunt ad arimannano homine, et ad iudice reclamaret suum, iudex aut per epistola aut proprio ore admoneat gasindio nostro, ut iudicet ipse. . . . Gasindius uero ipse, si distullerit iudicare, et legem non iudicauerit, iudix eum distringat idem arimanno iusticia faciendo: etc.

These two titles indicate one important fact in regard to the position of the gasindius of the king. He is shown here in conflict with the iudex, a conflict in which the favor of the king is on the side of the gasindius. In title 11, the iudex, the regular official of the district, is represented as oppressing a freeman who has entered the following of the gasindius of the king, because the freeman has entered the service of another. In this case the gasindius has the right to withdraw his follower from the ordinary jurisdiction and judge his case himself. In title 14 the iudex is forbidden to oppress the royal gasindii, "quoniam nos debemus gasindios nostros defendere;" and if the gasindius seems to be oppressing a freeman (arimannus) the iudex is empowered simply to admonish the gasindius by letter or by word of mouth to do justice to the freeman; only in the case that the gasindius, after being admonished, still refuses to give justice, can the iudex interfere personally in the case.

From these instances we may conclude that the term gasindius is used in the Lombard law of a person in the service of another, that the gasindius regis is a man in the personal service of the king, and as such enjoying the special favor of the king when he comes in conflict with the regular public official.

This meaning is borne out also by the derivation of the word. The original meaning is "follower," "companion," and it is the same word as the O. E. gesith, member of the royal comitatus. This

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meaning has partially survived in the modern German "Gesinde," servants, through O. H. G. kasinde, etc.[5]

In the Frankish formulæ and diplomata gasindus is used of a freeman in dependence upon a lord; it is used with terms which are the common ones to express such a relationship, amici, suscepti, pares, and in connection with the institution of the mittium, which is understood to mean the right of protection which the lord exercised over his dependent freemen.[6] The word occurs in the following instances:

> Marc. Form., I, no. 23 (M. G. LL. 4to, V): . . . suisque amicis aut gasindis, seu undecumque ipse legitimo redebit mitio.
>
> Marc. Form., I, no. 24: . . . cum omnibus rebus vel hominebus suis aut gasindis vel amicis, seu undecumque ipse legitimo reddebit mittio.
>
> *Ibid.* no. 32: . . . tam ipse ille quam pares, gasindi, vel amici eorum.
>
> Coll. Flav., no. 44: . . . et rebus, que pauperibus fuerant condonatae, maius per gasindus quam per sacerdotes dispergatur; etc.
>
> Diplomata I (M. G. folio), Childebert, 546: . . . una cum omnibus rebus vel hominibus suis, gasindis, amicis, susceptis vel qui per ipsum monasterium sperare videtur, vel unde legitimo mitio.

The only case in the formulæ where gasindus appears to mean unfree is in Marc. Form. II, no. 36: servo aut gasindo suo, and here also Waitz believes it refers to a freeman.[7]

The gesith of the Anglo-Saxon laws suggest a theory for the development of the Lombard gasindii regis; here the word has the

[5] Graff, Althochdeutscher Sprachschatz, 6. Thl., 231 ff: "sind. m., Weg, iter (goth. sinth, als Mal, z. B., antharamma sintha, *altera vice;* angels. sidh, *semita, iter;* tempus; sors. . . . GASINDI, n., Gesinde, *comitatus.*" Grimm, Deutsche Grammatik, II, p. 736 (under "partikel-composition. partikel mit nomen. ga-"): "sind (via) ga-sindo (minister, comes, servus)." See also Grimm, R. A., p. 318; Du Cange, s. v. *Gasindus,* and *Sindmanni.*

[6] In regard to amici, suscepti, pares, see Waitz, D. VG., II, 1, pp. 256-259. As to the mittium, *ibidem,* p. 418, and pp. 426 ff, "Anhang: Ueber die Bedeutung von Mithio."

[7] D. VG., II, 1, p. 259, n. 2; for the opposite opinion, Roth, Benef., p. 368.

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general meaning of "comrade," "follower," but is used especially of one of the king's comitatus, the members of which came to form an important official and landed class, being endowed by the king with land from the folk-land or from the royal lands.[8]

It becomes necessary, in the next place, to attempt to connect the gasindii of the king with actual persons appearing in the law. When we look in the Lombard code for a class of officials devoted especially to the royal service, we are immediately struck by a remarkable dualism in the administration. There appear side by side two sets of officials, the one consisting of the regular public officers, the duces or iudices and their subordinates, sculdahis, deganus aut saltarius, the other of the officials especially intrusted with the oversight of the royal domains, gastaldii and actores regis. Traces of such a dualism appear, of course, in the other Germanic laws,[9] but nowhere so clearly as in the Lombard code. The causes of this peculiar development will be discussed in a later section; it will be sufficient to notice here that these two classes of officials appear one along with the other throughout the law, at times in coöperation, but also at times in distinct conflict.

In fact, almost the first reference to the gastaldius hints at such a conflict, or at least provides an opportunity for it. This is in Ed. Roth. 23, 24:

> 23. Si dux exercitalem suum molestauerit iniuste, gastaldius eum solatiet, quousque ueritatem suam inueniat, et in presentiam regis aut certe aput ducem suum ad iustitiam perducat.
>
> 24. Si quis gastaldius exercitalem suum molestauerit contra rationem, dux eum solaciet, quousque ueritatem inueniat.

Here the dux and the gastaldius appear as coördinate officials, each having freemen (exercitales) under his jurisdiction and possessing mutual rights of protecting the subject of the other from oppression by that other.

[8] Stubbs, Const. Hist. of England, I, pp. 138, 162, 170; Kemble, Saxons in England, I, p. 168.

[9] *E. g.*, the domesticus and comes in the Frankish and Burgundian laws.

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The especial function of the gastaldius,[10] however, is the administration of the royal domains (curtes regis). It is in this connection that he is mentioned most frequently in the law:

> Ed. Roth. 210: De rapto qui in curtem regis duxerit. Si quis rapuerit haldiam aut ancillam alienam et in curtis regis duxerit, et sequens dominus aut quicumque ex amicis aut seruis: et gastaldius aut actor regis antesteterit, pro haldia de suis propriis rebus conponat illi, cuius haldia fuerit, etc.
>
> 271: De curtem regis. Si mancipius cuiuscumque in curtem regis confugium fecerit, et gastaldius aut actor regis ipsum mancipium post secundam aut tertiam contestationem reddere dilatauerit, ita iubemus ut reddat, etc.
>
> 375: Si gastaldius aut quicumque actor regis, post susceptas aut commissas ad gobernandum curtes regis et causas regias, aliquid per gairethinx, id est donationem, ab alio quocumque factam conquesierit, sit illi stabilem, etc.
>
> Liut. 59: Si quis gastaldius, uel actor curtem regiam habens ad gobernandum, ex ipsa curte alicui sine iussionem regis . . . dare presumpserit, etc.
>
> 78: De possessione, qui aliquit de puplico habit. . . . Et si hoc facere ausus non fuerit, aut forte gastaldius aut actor prouare potuerit, conpleti sexaginta anni possessio ipsa non sit, etc.

But since the gastaldius as we have seen is regarded as coördinate with the dux it follows that his office is that of administrator of the royal lands within the district of the dux, the dukedom or civitas. It also appears that he is intrusted with the trial of cases arising in connection with the royal possessions (Roth. 375: ad gobernandum curtes regis et *causas regias*), but to what extent this would bring the gastaldius in competition with the dux must be examined later. There are three cases where the gastaldius is connected with the sculdahis, rather than with his own subordinate, the actor regis. These cases have certain characteristics in common; either there are no relatives of the subject of the law, or else such relatives refuse to

[10] For the derivation of gastaldius see Grimm, Gesch. der deutschen Sprache, I, p. 480; see also Leo, Gesch. von Italien, I, p. 95, and Hegel, Städteverf., I, pp. 455–456.

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act; and the king has an especial interest in the penalty: Roth. 15, De crapuuorfin [Grab, werfen; de sepultura iactus]: the despoiler of a grave is to pay 900 solidi to the relatives of the dead man, but if there are no relatives the gastaldius regis or the sculdahis shall enforce the payment of the fine to the curtes regis; Roth. 189: the relatives of a maiden or a woman who has sinned with a freeman have the right to punish her, but if they neglect to do so then the gastaldius regis or the sculdahis is to take her under the jurisdiction of the king and judge her as may be pleasing to the king; Roth. 221: the relatives have the right to punish the free woman or maiden who has married a slave, and if they neglect to do so the gastaldius regis or the sculdahis shall bring her into the curtis regis and place her among the female slaves "in pisele."[11] In these cases it would seem that the gastaldius acts wih the sculdahis because the crimes are of a public interest, while the royal treasury is especially concerned with the payment of the penalty which comes to the curtes regis.

The actores regis are the regular subordinates of the gastaldius and are mentioned along with that official in the references given above: Roth. 210, 271, 375; Liut. 59, 78. They are also mentioned without the gastaldius in certain instances. In Roth. 272 the actor regis appears as the protector of the church; in Roth. 374 the life of the sculdahis and actor regis is protected by a special fine of 80 solidi aside from the regular wergeld of the freeman; the "Notitia de actoribus regis" is a body of instructions to the actores in regard to their obligations and duties. In general the actores seem to be placed in charge of the separate royal estates and to have a semi-official position with certain minor jurisdiction (Notitia: ut nullus iudex neque actor aut qui super furonis erit, etc.).

Reverting to the definition of gasindii as freemen in the personal service of the king, it seems evident that the adminstrators of the royal domains, the gastaldii and actores regis, must be reckoned among them. In fact, the gasindii regis mentioned in Ratchis 11 and 14 (quoted above) seem to be gastaldii. In both cases the gasindii appear to be in conflict with the regular public officials, the iudices. This conflict is best explained by identifying the ga-

[11] Du Cange, s. v. *Pisalis:* "Vox autem formata ex Latino *Pensile,* i. locus, in quo pensa trahunt mulieres, Gynaecium."

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sindius with the gastaldius and the iudex with the dux. In Ratchis 11 the displeasure of the iudex at the freeman who has taken service with the gasindius regis would be easily understood if the iudex here was the dux who saw one of his regular subjects escaping from his jurisdiction by taking service under the gastaldius in charge of the royal domains within that dukedom. The oppression of the gasindius by the iudex referred to in Ratchis 14 consists in the practice of the iudex drawing into his own jurisdiction cases where the gasindius seems to be treating a freeman unjustly. This claim to higher jurisdiction by the iudex is evidently based upon the authority given to the dux to interfere in the administration of the gastaldius when the latter appears to be doing a freeman injustice (Roth. 24). The complete identification of the iudex of Ratchis with the dux of Rothari will be attempted later.

There would be others engaged in the immediate royal service, besides those in charge of the royal lands. Among such officials of the royal administration would be included the officials of the palace and court. The laws contain no mention of them or of their duties, but references are to be found in other sources, especially in the Historia of Paulus Diaconus. In general, the offices and duties correspond to those of the court officials of the Frankish kingdom: Major domus, marshall, chancellor, chamberlain, etc.[12]

The position of the primi in the Lombard class system is a matter of considerable difficulty. Just what persons are meant by the term does not appear immediately from the law, since the term as applied to a definite class occurs only in Liut. 62, and the text of that title does not define its use. Some general conclusions may be arrived at, however, from a study of the title in question, which may then be applied to the social conditions in the Lombard kingdom as they appear in the code. In this way we may construct at least a plausible theory.

Going back to the analysis of Liut. 62 on a former page, it will be recalled that the division into minimae personae and primi was referred through Rothari's edict back to the unwritten Lombard

[12] Marshall: "qui eidem strator erat, quem lingua propria 'marpahis' appellant" (Paulus Diaconus, II, 9); in regard to the term marpahis see Grimm, Geschichte der deutschen Sprache, p. 481; chamberlain, vestiarius (Paulus, V, 2); for the major domus, cupbearer, chancellor, etc., see Hegel, Gesch. d. Städteverf. von Italien, I, p. 465, and documents referred to there.

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laws. We possess no detailed information as to the structure of the Lombard system before the invasion of Italy, by which we could determine the cause of the higher wergeld of the primi at that period. Among the other tribes, however, where a distinction is made between two classes of freemen, this distinction is regularly between ordinary freemen and nobles; this is the case with the Saxons on the continent and the Jutes in England, with the Frisians, with the Thuringians, and with the Bavarians.[13]

This may well have been the case with the primitive Lombard law, for there are evidences that noble families were recognized among the Lombards. It does not follow, however, that the primi of Liut. 62 are the tribal nobles of the primitive unwritten law. In fact, the stage of development indicated in the laws of Liutprand would not readily allow for the persistence of the tribal nobles. The establishment of a strong monarchy, the creation of a definite class of royal servants dependent upon the favor of the king for their position, the existence of dependent freemen, are features not generally consistent with the existence of an exclusive class of tribal nobles. The survival of such a class is rendered still more unlikely when we regard the history and the political structure of the tribe. The 150 years from the invasion to the time of Liutprand were years of struggle and warfare; on the one hand, constant strife with the Roman Empire and the neighboring peoples, Franks and Avars; on the other, frequent civil wars due to revolts of the dukes and contest over the succession. In these civil wars the opponents of the king were not the tribal nobles, but the dukes, representing the strife for local independence on the part of the separate districts. The laws of Liutprand nowhere refer to a distinct noble class; in fact, the term nobilis in Liutprand seems to be used as ingenuus.[14]

The only other class with whom the primi could be identified as an exclusive class above the ordinary freemen and distinct from

[13] Lex Saxonum: liberi, nobiles (frilingi, edhelingi); Aethelbirht's law: ceorlas, eorlas; Lex Frisionum: liberi, nobiles (friling, etheling); Lex. Angl. et Werin.: liberi, adalingi; for the Bavarian law see below, pp. 120 f.

[14] Compare "universis nobilibus langobardis" of the prologue to the year 720 with corresponding expressions in the other prologues: "ceteris nostris langobardis," "reliquis fidelibus meis langobardis." In title 89 "reliqui nouilis homenis" seems to mean the freemen.

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the private officials of the king, would be the chief public officials, *i. e.*, the dukes. This distinction in wergeld would agree with the contrast between the public and private officials throughout the law. It may be suggested as a theory that the privileges of the tribal nobles passed over to the chief officials, who in their origin must have been drawn largely from the nobles. In order to test this theory it will be necessary to study the position of the dux in the history and in the laws of the Lombards.

The chief source for the early history of the Lombards and the origin of their institutions is the *Historia Langobardorum* of Paulus Diaconus. Paulus draws his early material from the *Origo gentis Langobardorum*. He gives the origin of the Lombards thus: Owing to the increase in population the Winnili, inhabiting the Scandinavian peninsula, cast lots to decide which of three divisions of the people should seek new homes elsewhere. The part on whom the lot fell chose as their leaders two dukes, the brothers Ibor and Aio, and crossed over to the mainland, settling in Scoringa (?). Here they defeated the Vandals and Assipitti, and moved on to Mauringa (?). On the death of their two dukes, "nolentes iam ultra Langobardi esse sub ducibus, regem sibi ad ceterarum instar gentium statuerunt." This king was Agilmund, son of Aio, "ex prosapia ducens originem Gungingorum, quae aput eos generosior habebatur" (Paulus, I, 14). The course of the subsequent wanderings of the Lombards down to their settlement in Pannonia is not very clear — and is not of great importance for our purpose. The second king of the Lombards was Lamissio, according to the Origo the son of Agilmund, according to Paulus his adopted son. On his death a new line comes in with Lethu, to which belong the next six kings, Hildeoc, Gudeoc, Claffo, Tato, Waccho and Walthari; "Isti omnes Lithingi fuerunt," Origo 4; "Hi omnes Lithingi fuerunt. Sic enim aput eos quaedam nobilis prosapia vocabatur," Paulus, I, 21. Under the next king, Audoin, according to Paulus, the Lombards entered Pannonia. Their brief stay here is marked by their continuous wars with the Gepidae, who were finally overthrown by Alboin, the son of Audoin, and by their participation in the wars of Narses against the Ostrogoths. It was this latter undertaking, doubtless, which, by acquainting the Lombards with the resources of Italy and the weakness of its guards, furnished the incentive for the invasion of that province. In April, 568, the en-

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tire tribe under the leadership of Alboin left Pannonia and began the movement upon Italy.

There is not much to be learned respecting the primitive institutions of the Lombards from this legendary account of their origin. The departure of a part of the tribe under the two dukes recalls the invasion of England by the Jutes under Hengist and Horsa and by the Saxons under Cerdic and Cynric. Leo (Geschichte von Italien, I, p. 67) argues that the Lombard system was based upon a military organization: "This entire early history of the Lombards shows that some time before their invasion of Italy they had ceased to be a people and existed only as an army. . . . By the increasing accessions of young warriors from the Saxons, Thuringians, Bavarians, etc., and by the absorption of the remains of conquered peoples and exiled leaders with their followers, the Lombards became ever more powerful and developed into an increasingly important race (Volksstamm); since, however, this growth took place only gradually, the constitution of the tribe preserved throughout the form of the German military system." This view, if accepted, will account for the perseverance of the title dux in the Lombard system for the regular administrative official of the district and for the use of the terms arimannus and exercitalis in referring to the freeman. The origin of these officials, however, must be largely a matter of conjecture. The probable theory is that the two dukes under whom the tribe set forth on their wanderings correspond to those principes whom Tacitus mentions as seeking employment with their followers outside of their own tribe. When such an expedition was successful it would naturally attract to it numbers from the home-land, and from neighboring tribes. The war-leader of such a folk-army would develop into a king by a natural and easy process.

The nature of the Lombard institutions will appear more clearly from a study of the development from the time of the invasion down to the appearance of the edict of Rothari. The first reference in Paulus Diaconus to the duke after the time of the creation of the kingship occurs in connection with the entrance of the Lombards into Italy. This entrance was effected without difficulty through the territory of Venetia. Alboin determined that this, the easiest approach to Italy on the east, must be guarded by a garrison: "igitur . . . dum Alboin animum intenderet, quem in his locis ducem

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constituere deberet, Gisulfum, . . . suum nepotem, . . . Foroiulanae civitati et totae illius regioni praeficere statuit" (Paulus, II, 9). It is to be noticed in regard to Gisulf that he was appointed by the king and that he was to rule over a civitas, and the adjoining region. Alboin died soon after the invasion of Italy and the Lombards chose by common consent Cleph, "nobilissimum de suis virum," to be king. He seems to have been duke of Pavia. "After his death the Lombards were without a king for the space of ten years, and were under dukes. Each of the dukes ruled his own civitas: Zaban Pavia, Wallari Bergamo, Alichis Brescia, Eoin Triente, Gisulf Friuli. But beside these there were 30 other dukes in their own cities" (Paulus, II, 32). After ten years of interregnum the Lombards again chose a king in the person of Authari, the son of Cleph. On the restoration of the kingship, Paulus says, "the dukes gave up half of all their substance for the royal uses" (III, 16). It is altogether likely that the property thus given up was part of the royal possessions that had been seized by the dukes at the time of the interregnum.

The succeeding reigns of Authari and Agilulf were largely taken up with reducing the dukes to subordination. Under Authari, Droctulf, duke of Bersello, rebelled and gave his territory into the hands of the imperial party, represented by the exarch at Ravenna. This Droctulf is said by Paulus to have been an Alemannian who had taken service with the Lombards and had won his way to the position of duke. Authari was able to retake the territory which he had handed over to the exarch, but Droctulf himself escaped.

The succession of Agilulf is the occasion for an interesting tale in Paulus. Agilulf, "qui et Ago dictus est" (Paulus, IV, 1), was a Thuringian (Ed. Roth. proem. "Quartusdecimus agilulf, turingus, ex genere anauuas"; Origo, c. 6) and duke of Torino. On the death of Authari the Lombards out of regard for his wife, the sainted Theudelinda, permitted her to choose "as a husband a man who could govern the kingdom wisely. She therefore with advice of wise men chose Agilulf, duke of Torino, to be at the same time husband to her and king to the people of the Lombards" (Paulus, III, 35). Agilulf had to face many rebellions, but he was able in each case to make good his authority. Mimulf, duke of Iuli (S. Iuliani insula), Maurisio of Perugia, Gaidulf of Bergamo, Zangrulf of Verona, and Warnecautius of Pavia were all defeated and slain by

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him; Ulfari of Treviso, Gaidoald of Triente, and Gisulf of Friuli were brought back to their allegiance; Zotto, duke of Beneventum, was succeeded by Arigis, a native of Friuli, an appointee of the king. Yet there is evidence that the principle of heredity was becoming attached to the position of duke. Thus on the death of Ariulf of Spoleto the two sons of the former duke, Faroald, engage in a struggle over the succession, which is won by Theudelapius; in Friuli Gisulf is succeeded by his two sons Taso and Cacco, who are treacherously slain by the Roman patricius, Gregory, and the succession comes to the brother of Gisulf.

After the uneventful reigns of Adaloald and Arioald, Rothari, the author of the edict, comes to the throne. From his reign to the accession of Liutprand the Lombard kingdom is distracted by almost continuous civil war over the succession, in which the dukes play a very important role. The dukedoms of Beneventum and Spoleto become practically independent of the royal control. Rodoald succeeds his father Rothari as king, but his two sons Berthari and Godepert are driven out of the kingdom by Grimoald, duke of Beneventum, who seizes the throne for himself. Grimoald's son Garibald is in turn expelled by Berthari, the former refugee, who succeeds in regaining the kingdom and leaving it to his son Cunipert. They are able to hold their position, however, only by constant warfare, each of them being forced to flee for a time by Alahis, duke of Triente. But Liutpert, the son of Cunipert, is driven out by the duke of Torino, son of that Godepert who had fought with his brothers for the throne, and therefore the cousin of Liutpert. The struggle continues after the death of Raginpert, and finally ends in the accession of Liutprand.

Under the strong rule of Liutprand the dukes were kept in obedience, but their importance and independence were by no means slight. Faroald, duke of Spoleto, on his own initiative, invaded the territory of the exarch and took the city of Classis, but was forced by Liutprand to return it to the Roman ruler. Pemmo, duke of Friuli, was deposed by Liutprand, but the dukedom was given to his son Ratchis; this Ratchis invaded Carniola, on his own account apparently. Peredeo, duke of Viacenza, with Ansprand, the nephew of Liutprand, make an independent attack upon Ravenna. Liutprand made a determined effort to reduce the dukes of Spoleto and Beneventum to his control. In these dukedoms the principle of

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heredity had become thoroughly established and they were ruled quite independently under most of the kings. In Spoleto, Liutprand deposed the duke, Transamund II, and appointed one Hilderich in his place. Transamund returned from Rome, whither he had fled to escape the wrath of Liutprand, and slew Hilderich; thereupon Liutprand siezed him and made a "clericus" of him and put his own nephew Agriprand in the place. Romuald II of Beneventum on his death left the dukedom to his infant son Gisulf, but Liutprand decided that the child was too young to rule and put in his nephew Gregory. On the death of Gregory Godescalc siezed the duchy and held it for three years, but was deposed by the king, and the former duke Gisulf, also, according to Paulus, a nephew of Liutprand, was restored to the position.

This brief sketch of the activity of the dukes in the course of Lombard history is necessary because it gives information in regard to the nature of the office not contained in the law. The duties and powers of the dukes are defined in the code, but nothing is said as to the manner of appointing or the extent of political power. Some conclusions in regard to these matters may be reached from the above sketch.

The legal theory in regard to the appointment of the duke is not clear. It is rendered difficult by the absence of knowledge as to the origin of the office. In practice there seems to have been a confusion, at times a conflict, of principles. The king appears at times to exercise the right of deposition and appointment, in other instances there seems to be a tacit recognition of a right of succession, while the form used in still other instances suggests a survival of popular election.

There are several instances where the duke gained his position by royal appointment. Thus the first dukedom instituted in Italy was that of Friuli, over which Alboin appointed his nephew Gisulf. Whether the same course had been followed in the case of the 35 dukes who ruled the country after the death of Cleph, does not appear. It seems not unlikely that Alboin as the leader of the invasion assumed the right to appoint dukes over the regions as they fell to his power. Gundoald, who came from Bavaria with his sister Theudelinda at the time of her marriage to King Authari, was made duke of Asti by the king (Origo, c. 6). On the death of Zotto of Beneventum, Arigis, a relative of Gisulf of Friuli, was sent

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to succeed him by King Agilulf ("Mortuo . . Zottone . . Arigis in loco ipsius a rege Agilulfo missus successit." Paulus, IV, 18). Liutprand exercised the right of appointment also in the instances referred to above in connection with the duchies of Spoleto and Beneventum.

There is evidence also of a tendency of the dukes to treat their districts as hereditary. This becomes a regular practice with the dukedoms of Spoleto and Beneventum, which became almost independent by reason of their expansion over the Roman territory in the south and their remoteness from the center of the kingdom; but it is not entirely absent in respect to the other dukedoms. This appears in the instances cited above in regard to the dukedom of Friuli.

There are also certain vague indications that the people possessed some influence in the choice of their dukes. This seems to have been true at least in the case of the legendary dukes Aio and Ibor; "Igitur ea pars, cui sors dederat genitale solum excedere . . . ordinatis super se duobus ducibus, Ibor scilicet et Aionem, . . . iter arripiunt" (Paulus, I, 3). The same thing appears in the time of Liutprand, when the Beneventans, "qui suis ductoribus semper fidelis extitit" (Paulus, VI, 55), defeat the conspiracy against the infant son of Romuald. In several instances expressions are used the very vagueness of which hint at the survival of popular influence. In Friuli, it is said, Grasulf *is constituted* duke, "dux Foroiulanis Grasulfus . . constituitur" (IV, 39); later Ago *receives* the dukedom of Friuli to rule, "Foroiulensem ducatum Ago regendum suscepit" (IV, 50); Atto *is made* duke in Spoleto, "Aput Spoletim quoque Theudelaupo defuncto, Atto eidem civitati ductor efficitur" (IV, 50). Of Droctulf it is said that he *merited* the honor of a dukedom: "Iste ex Suavorum, hoc est Alamannorum, gente oriundus, inter Langobardis creverat, et . . . ducatus honorem meruerat" (III, 18).

In general, however, it would seem that the king claimed and exercised the right of appointment, that the dukes were to that extent royal officials. Aside from the cases of hereditary succession, which must be regarded as the result of a development away from the legal theory, the only instances of succession in office where a definite statement occurs are cases of royal appointment.

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It has been argued above that the gastaldii from the nature of their office must be reckoned among the gasindii of the king and not among the primi. The converse can be shown in regard to the dukes from the study of the ducal office in Paulus which has been undertaken. The strength of the dukes lay largely in their political power. They may be said to represent in a way the separatist tendencies of the districts which they governed; so, as we have seen, on the death of Cleph the kingdom for a time falls apart into independent dukedoms each under its own duke. And their power seems to be in direct ratio to their independence of the king. Their strength comes out most evidently in their conflicts with the royal authority. When the monarchy is weak or is distracted by struggles over the succession, then the dukes seize the opportunity to increase their power. Instances of this are frequent throughout the whole course of the Lombard history; in the division of the kingdom into independent dukedoms at the death of Cleph; in the revolts of the dukes under Authari and Agilulf (which may be regarded as a survival of the independence during the interregnum just mentioned); in the usurpation of the throne by Grimuald, duke of Benventum, on the occasion of the strife of the two brothers Godepert and Berthari; in the revolt of Alahis of Triente in the reigns of Berthari and his son Cunipert; in the practical independence of the dukes of Spoleto and Beneventum during the latter part of Lombard history.

This is not at all in accordance with the nature of the office of the gasindii of the king. Their power depended upon their relation to the king; their authority was that of royal office, their importance varied directly with the strength of the monarch. Comparing the Anglo-Saxon system with the Lombard, the ealdorman corresponds to the duke, and the scir-gerefa to the gastaldius. It will occur to the mind that the later sheriff becomes a very important official under the Norman rule and one not infrequently in conflict with the royal authority, but this is the result of a long development; in the beginning the scir-gerefa appears as the servant of the king. The Frankish system presents this difference, that the representative of the king of the former little tribe had not survived as he did in the person of the ealdorman in the English system, that the distinction between public royal and private royal officials was not preserved there, that therefore the comes, usually without doubt a member of the trustis of the king, that is, a gasindius regis in the Lom-

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bard terminology, assumed more readily the position of a representative of the independent tendencies of his district; even here, however, the comes became independent of the royal authority only as the result of a long period of development under especially favorable conditions. Owing to causes the workings of which are not easily traceable, the Lombard dukes possess or early develop an independent position, a political power not at all consistent with the character of a private royal official, a gasindius of the king.

After this glance at the origin and nature of the ducal office in the Historia of Paulus Diaconus, we may turn now to a consideration of the position of the dukes in the Lombard code.

In the Edictus Rothari the dux is the military and civil head of the district, with no authority above him but that of the king; as such he has authority over the military contingent of his district, is the head of the administration of justice and receives half the fines levied, at least in certain cases. His military authority appears in the following sections:

> 6. Si quis foris in exercitum seditionem leuauerit contra ducem suum aut contra eum qui ordinatus est a rege ad exercitum gubernandi, aut aliquam partem exercetum seduxerit, sanguinis sui incurrat periculum.
>
> 21. Si quis in exercito ambolare contempserit aut in sculca, dit regi et duci suo solidos 20.

The judicial authority of the dux is shown by sections 20 and 23, 24 (cited above):

> 20. Si quis de exercitales ducem suum contempserit ad iustitiam, uigenti solidos conponat regi et duci suo.

In section 225 referred to above it appears that the dux had his own personal following: "Et si alequid in gasindio ducis, aut priuatorum hominum obsequium," etc.

In the laws of Liutprand the dux is not mentioned by name. We know, however, from our study of the dux in Paulus Diaconus that he occupied the same position in the time of Liutprand as in the time before. The dux must appear, therefore, under some other title.

The duke is recognized without difficulty under the name of iudex. This is made perfectly plain by titles 25-28, of the year 721. These titles are intended to secure the subject against injustice on the

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part of the regular officials. Title 25 considers the case where both parties to a suit are subjects of the same sculdahis; if the sculdahis neglects to do justice within four days he is to pay six solidi to the complainant and six to the iudex; if the case is of such a character that the sculdahis is not competent to decide it, he should direct both parties to the iudex. If the iudex fails to try the case within six days he must pay the complainant 12 solidi, but if the case does not come within his competence he must pass it up to the king within 12 days, on penalty of a fine of 12 solidi to the complainant and 20 solidi to the king. Title 26 treats of the case where the two parties are subject to the same iudex but to two different sculdahis. In that case the complainant proceeds with a representative or a letter from his own sculdahis to the sculdahis of the defendant; if this official fails to do his duty the same procedure is instituted as in title 25. In title 27 is considered the further case where the parties live in different civitates. It is worth citing:

> 27. VIII. Si quis in aliam ciuitatem causam habuerit, uadat cum epistola de iudice suo ad iudicem qui in loco est. Et si ipse iudex ei iustitia intra octo dies menime facere distrinxerit, aut non conpleuerit, conponat illi qui causam suam reclamauit, solidos 20 et regi alius 20. Et si talis causa fuerit, quam deliberare menime possit, ponat constituto, et distringat hominem illum de sub sua iudicaria, intra duodecim dies in presentiam regis uenire. Nam si aliter fecerit, etc.

Title 28 completes this section by fixing the fine which the subject who accuses the iudex of injustice without warrant must pay to the iudex, and the fine which the iudex must pay for not judging according to the law.

The position of the iudex in the administration appears also from titles 44 and 85. In 44 (De seruo fugace et aduena homine) the gradation of officials in the iudicaria is deganus aut saltarius, sculdahis, iudex. The deganus aut saltarius, the local official with police functions, is responsible to the sculdahis, the sculdahis to the iudex, but the iudex directly to the king. The same gradation is given in 85, which concerns the detection and punishment of pagan worship.

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It is impossible to avoid the conclusion that the iudex of these sections is the official known in the Edictus Roth. and in Paulus as the dux. He is here the head of the regular administrative district, known as the civitas or iudicaria. The lower officials are responsible directly to him, while he is responsible to the king alone. According to title 83 (De omnibus iudicibus, quando in exercito ambolare necessitas fuerit, non dimittant alios homenis, nisi, etc.) the iudex is also the chief military authority of the district.

The iudex of the laws of Ratchis is also the same as the dux of Hothari and Paulus. His district is the civitas (1: Ut nusquisque iudex in suam ciuitatem debeat cottidie in iudicium residere, etc.; 2: ut debeat reuertere unusquisque causam habentem ad ciuitatem suam ad iudicem suum, etc.); he has the military as well as civil authority in his district (title 4); the same local officials are under his control, and are known here as sculdahis, centini, and locopositi (title 1).

There are two cases in the laws of Liutprand where the term iudex is used for the gastaldius. These are title 59, which concerns the fraudulent dealings of the gastaldii and actores in regard to the royal domains intrusted to their care; the expression at the beginning of the title: Si quis gastaldius aut actor, is replaced further on by the words: quod si iudex aut actor; and title 78, where iudex and actor in one place is given as gastaldius and actor in another. From these instances and from the use of the term iudex in the prologues to the various sections of the laws of Liutprand, it may be conjectured that the word was also used in a general sense for the chief officials of both clases in their judicial capacity. But where the iudex is spoken of as a definite official in the laws of Liutprand or Ratchis it seems clear that the dux is meant.

To assign two meanings to the one term used in a single body of writing is always subject to serious objection, and is only justified when different meanings are required to explain the various uses of the term. This certainly seems to be the case here. The iudex mentioned in Liutprand 25-28 and in Ratchis is a definite official with a prescribed territory and definite officials under him. In Ratchis 11 and 14 this iudex is expressly contrasted with the gasindius of the king, the private royal official. But in the various prologues of Liutprand the term iudices is used in a general sense for

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all the officials who form the council of the king or aid him in preparing the laws, and this body would necessarily include the chief gasindii.[15] Again in Liut. 59 and 78 the title iudex is expressly applied to the gastaldius, who must be counted as one of the gasindii. Here are two distinct meanings of the word, both of which are required by the context of the places in which the word occurs. This will dispose of the instances which are not consistent with the identification of the iudex as dux, and will leave unimpaired the value of that identification.

This whole discussion of the position of the dukes has been undertaken for the purpose of testing the theory that they are the primi of Liut. 62. In the light of the above study the following development may be suggested: During the period before the invasion of Italy the customary law of the Lombard tribe recognized a special class of tribal nobles with a wergeld higher than that of the ordinary freemen. But as the result of the settlement there was a great increase in the power and authority of the leaders of the divisions of the tribes, the dukes, to whom apparently was left a large part of the work of the actual conquest and who early appear as representing the separatist tendency of the districts which they rule. These dukes came to take the place of the tribal nobles in the consideration of the Lombards, so that by the time of Rothari they were regarded as the higher class above the freemen. This transfer of the privileges of the tribal nobles to the dukes is further indicated by the fact that the king is regularly chosen from the dukes in the case of failure of the royal line, and this transfer was rendered natural by the fact that the leaders of the divisions were originally doubtless largely drawn from among the nobles. It was apparently the above-mentioned tendency of the dukedoms to become independent under their dukes which preserved the distinction between the private servants of the king and the public officials, and prevented that union of both offices in one person which we see in the case of the Frankish comes. Under Liutprand the other set of officials, the royal gasindii, were made a special class, the

[15] This general value of iudices appears immediately if we compare its use in the prologue to the year 713: omnibus iudicibus tam de austriae et neustriae partibus, necnon et de tusciae finibus; 717: nostrisque iudicibus; etc., with the coördinate term in the prologue of the year 720: inlustribus ueris *obtimatibus* meis neustriae austriae et tusciae partibus.

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highest of whom were given a wergeld equal to that of the primi or dukes.

This development seems quite natural in the light of the history of the Lombards and the structure of the Lombard state, while the survival of the tribal nobles as a distinct class is rendered very unlikely by the complete absence of reference to such a class in the law and by the stage of development indicated there. It must be admitted that the identification of the primus as the duke lacks much of being proved, but it seems on the whole the most reasonable theory. The objection that the king-made law would not be likely to give the dukes such a position, is met by the obvious fact that the position of the dukes was too strong to be broken by the king. It had the strength of popular custom ("consuitudo") behind it, as well as the actual power of the dukes in their districts. The most that Liutprand could do was to make the king's personal officials a special class, equaling the dukes in its highest members.

There is no difficulty in regard to the constituency of the class represented by the "minima persona, qui exercitalis homo esse inuenitur." The expression exercitalis homo, used to define the minima persona, is the Latin equivalent of arimannus (Gothic, hari, Heer, and manna, Mann).[16] Both of these terms are used throughout the Lombard laws to signify the ordinary freeman of the Lombards, a use which, as has been suggested, may be due to the military origin and character of the Lombard institutions. To this would correspond the use of the term exercitus for folk in Rothari 386.

In secs. 20, 23, 24 of the Edictus quoted above, the term exercitalis is used for the ordinary subject of the dux or the gastaldius, the freeman. In 373 the expression "sicut aliorum exercitalium" is equivalent to "sicut aliorum Langobardorum" or "liberorum hominum."

> 373. Si seruus regis hoberus aut uuecuuorin seu marahuorf, aut qualibet alia culpa minorem fecerit, ita conponat, sicut *aliorum exercitalium,* quae supra decreta sunt, conponuntur.

[16] Savigny (Geschichte des römischen Rechts im Mittelalter, I, pp. 182-214) has brought together all the cases of the use of this term in documents. For the derivation given in the text see Grimm, Gesch. d. deutschen Sprache, I, p. 480.

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ex ipsis in obsequium regis aut *iudicis* aliquas res adquesiuerit; and in Ratchis 10: iudex . . . adtenderit ad gasindium . . . suum; while the follower of the gasindius regis is mentioned in Ratchis 11: liber homo in seruitio de gasindio regis.

A certain portion of the freemen were also free tenants in the time of Liutprand. The exercitales who were subject to the jurisdiction of the gastaldius were probably free tenants of the royal lands, curtes regis. The existence of such tenants upon the royal domains is suggested in Liut. 59, where the gastaldius and actor are forbidden to give to anyone without the consent of the king "*casa tributaria*, uel terram, siluam," etc. The presence of free tenants upon other land is shown in Liut. 92: Si quis liber homo, in *terra aliena* resedens *liuellario nomine*, etc. Landless freemen were also known to the Lombard state in the time of Liutprand, as shown by Liut. 83:

> 83. De omnibus iudicibus, quando in exercito ambolare necessitas fuerit, non dimittant alios homenis, nisi tantummodo qui unum cauallo habent, hoc est homines sex; et tollant ad saumas suas ipsos cauallos sex; et de minimis hominibus, *qui nec casas nec terras suas habent*, dimittant homenis decem: et ipsi homenis ad ipsum iudicem faciant per ebdomata una operas tres, usque dum ipse iudex de exercito reuertitur.

These minimi homines are evidently exercitales, for they are among those liable to military service under the regular officials. The iudex or dux is permitted to use the services of ten of them three days in the week (on his own estates, it would seem) in lieu of military service, until his return from the campaign. The same class appears in the military regulations of Aistulf (Ahistulfi Leges, 2, 3). Here the equipment is regulated according to the possessions of the subjects; they are divided into three classes: those who possess seven tenant farms (casas massarias=mansuarias), those who do not possess tenant-farms but have 40 acres of land (quadraginta iugis terrae), and minores homines, who are evidently landless freemen. Title 3 treats of "negotiantes" who have no "pecunias" (peculium) and divides them into "maiores et potentes," "sequentes," and "minores"; these would appear to be Lombards who had gone into the cities and engaged in business after the Roman fashion.

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This lowest class, then, the member of which is known as "minima persona, qui exercitalis homo esse inuenitur," comprises the ordinary freemen of all classes. There is here no distinction between large land-holders, on the one hand, and free tenants and vassi, on the other, as in the Alemannian law, or between simple freemen with small freeholds and the owners of large estates, as in the Burgundian law. The exercitales or arimanni are all the freemen, landowners, free tenants, and free servants.[18]

To sum up, the three classes of freemen fixed by Liut. 62 have been identified as the following portions of the Lombard population: the primi with a wergeld of 300 solidi are the dukes of the various civitates; the minimae personae or exercitales with a wergeld of 150 solidi are the ordinary freemen, the mass of the free population; the gasindii regis with varying wergelds from 200 to 300 solidi are the personal officials of the king, the officials of his palace and court, and the administrators of the scattered royal possessions, gastaldii and actores regis.

[18] The attempt of von Maurer (Adel, pp. 35, 36) to establish a class of freemen between the primi and the minimae personae, known as mediocres, rests upon too insecure ground. The only instances of the use of the term are once in Paulus Diaconus and once in Radelgisi et Siginulfi Divisio, of the year 851. In Paulus the use of the term is too vague (VI, 40: multorum ibi monachorum, nobilium et mediocrium), while the classification of Radelgis belongs to a period a century later than the last of the genuine Lombard edicts (Ahistulfi Leges, a. 755). The gradations of freemen according to their landed wealth in Ahistulf. 2, and Liut. 83 are in both cases special laws regulating the amount of military service. These laws cannot be understood as establishing definite classes of freemen to be valid in other respects.

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law between two classes of freemen in regard to fines to be paid for injuries and breaches and in other cases. This indicates a more complete separation of the two classes in the eyes of the law; at the same time it renders more apparent the basis of distinction.

There are frequent instances in the Lex Visigothorum where a distinction is made between a higher and a lower class. The terms used for the higher class are: maioris loci persona, maior persona, nobilior persona, nobilis persona, potentior, etc.; for the lower class: inferior persona, minor, minoris loci persona, vilior persona, pauper, etc. As has been said, this distinction occurs most frequently in regard to penalties. The inferior is commonly assessed a smaller money fine than the maior, but is not infrequently to be punished by blows. This will appear more clearly from the following table:

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TABLE SHOWING DIFFERENCE IN PUNISHMENT BETWEEN HIGHER AND LOWER FREEMEN IN THE VISIGOTHIC LAW.

Lex Visi.	Case.	Maior Persona, Etc.		Minor Persona, Etc.	
		Terms Used.	Punishment.	Terms Used.	Punishment.
II, 1. 7	Calumny against king.	nobilis idoneusque persona.	lose ½ property.	vilior humiliorque persona.	punishment left to the king.
II, 1. 31	Neglect of royal command.	nobilior persona.	3 librae auri.	talis, qui non habeat unde anc rei summam adimpleat.	100 blows.
II, 2. 8	Refusal to leave court at command of judge.	potens.	2 librae auri.	reliqui ingenui seu servi.	50 blows.
II, 4. 2	Refusal to testify.	nobilis.	loss of right to testify.	ingenua, minoris dignitatis, persona.	loss of right to testify and 100 blows.
II, 4. 3	False testimony.	honestior persona.	loss of right to testify and double compensation.	inferior persona, et unde duplam rem dare non habeat.	loss of right to testify and 100 blows.

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TABLE SHOWING DIFFERENCE IN PUNISHMENT, ETC.—Continued.

Lex Visi.	Case.	Maior Persona, Etc.		Minor Persona, Etc.	
		Terms Used.	Punishment.	Terms Used.	Punishment.
II, 4. 6	False testimony.	maioris loci persona.	loss of right to testify and compensation.	minoris loci persona, et non habuerit unde conponat.	become slave of person wronged.
VII, 2. 20	Allowing a thief to escape.	maioris loci persona.	100 blows and put in place of thief.	minor persona.	100 blows and put in place of thief.
VII, 2. 22	Failure to deliver up a captured thief.	honestioris loci persona.	10 solidi; 5 to judge, 5 to injured party.	quis.	5 solidi to judge.
VII, 5. 1	Falsifying royal document.	honestior persona.	½ property.	minor persona.	loss of hand.
VII, 5. 2	Forgery of documents.	potentiores.	¼ property.	humilior viliorque persona.	servitude to injured party and 100 blows.
VII, 6. 2	Counterfeiting money.	ingenuus.	½ property.	humilior.	loss of freedom.

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VIII, 3. 6	Burning or breaking a hedge.	maioris loci persona.	repair damage and pay for injury to crops.	persona inferior.	repair damage, pay for injury, and 50 blows.
VIII, 3. 10	Letting flocks into vineyard or crops.	maior persona.	pay for injury to crops, and 1 sol. for each head of large cattle and 1 trem. for each head of smaller cattle.	inferior persona.	pay for injury and ½ fine of maior persona and 40 blows.
VIII, 3. 12	Letting flocks into (common?) meadow during prohibited season.	maior persona.	pay for damages and 1 sol. for every 2 head of cattle.	liber et inferioris loci persona.	pay for damages and 1 trem. for every 2 head of cattle.
VIII, 3. 14	Injury to cattle.	honestior persona.	5 sol. and double compensation.	humilioris loci persona et non habuerit unde conponat.	double compensation and 50 blows.
VIII, 4. 24	Obstructing public road (by hedge or ditch).	potentior.	20 solidi.	reliquae personae	10 solidi.
VIII, 4. 25	Infringing upon public road.	maioris loci persona.	15 solidi.	inferior persona.	8 solidi.

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TABLE SHOWING DIFFERENCE IN PUNISHMENT, ETC.—Concluded.

Lex Visi.	Case.	Maior Persona, Etc.		Minor Persona, Etc.	
		Terms Used.	Punishment.	Terms Used.	Punishment.
VIII, 4. 29	Obstructing navigable river.	honestioris loci persona.	10 sol. to injured parties.	inferior persona.	5 sol. and 50 blows.
	Breaking down legitimate barriers.	comes civitatis aut aliquis cuiuscumque.	10 sol. to owner of barrier.	minor persona.	5 sol. to owner and 50 blows.
IX. 3. 3	Seizing by force a slave or debtor who has sought sanctuary.	honestioris loci persona.	100 sol. to the altar.	inferior persona. quod si non habuerit unde conponat.	30 solidi. 100 blows.

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This table shows very clearly that the chief reason for the difference in the fine to be paid by the maior and that to be paid by the minor is the poverty of the latter. This is shown by the frequent occurrence of the expression "et non habuerit unde conponat." This expression occurs in a great many sections where no distinction in class is mentioned, indicating that corporeal punishment was regularly used as a penalty where the fines could not be paid. Its occurrence in the cases cited in the table means, therefore, that the lower class were supposed to be too poor to pay the heavy money fines; that poverty was regarded as a characteristic of that class. In II, 1. 31, the nobilior persona who is to pay 3 pounds of gold, is contrasted with "one who has not wherewith to pay such a sum" (talis qui non habet unde anc rei summam adinpleat), and who is to be punished with 100 blows; in II, 4. 3, the honestior persona must make two-fold restitution, while the inferior persona who is not able to pay double satisfaction (et unde duplam rem dare non habeat) receives 100 blows; in II, 4. 6, minoris loci persona is to become the slave of the injured party, on the ground that he is not able to make satisfaction (et non habuerit unde conponat); in VIII, 3. 14, humilioris loci persona is to be given 50 blows in place of the 5 solidi fine which the honestior persona has to pay in addition to the damages; in IX, 3. 3, the inferior loci persona pays 30 solidi in place of the 100 solidi of the honestioris loci persona, but if he is not able to pay this amount (quod si non habuerit unde conponat) he is to be given 100 blows.

In these cases the reason for the difference in the fine is stated in the text; the inferior persona is the one who has not sufficient property to pay the heavy fines. But this is just as clear in the other cases where the expression "et non habuerit" is not used. In II, 2. 8; VII, 5. 1; VII, 5. 2; VII, 6. 2; VIII, 3. 6; VIII, 3. 10; VIII, 4. 29, the minor, inferior pays either no fine or a smaller fine than the honestior, and is forced to make up the difference by being flogged; in VII, 2. 22; VIII, 3. 12; VIII, 4. 24; VIII, 4. 25, the minor simply pays a smaller fine than the honestior.

Another fact that appears from this table is that the different terms used respectively of the two classes are practically interchangeable. The same class is meant in the law, whether the member of it is spoken of as nobilis, honestior, maior, maioris loci persona, or potens; in general it is the higher class of the population as distinct

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from the lower. The same thing is true respectively of the other class. The member of the lower class is spoken of indifferently as minor, inferior, humilior, vilior, pauper. This general, untechnical use of these various terms suggests the wide separation of the two classes — a separation so complete that a member of the higher class is recognized as such whether he be called noble, powerful, greater person, more honorable person, or person of higher, more honorable place (maioris loci, honestioris loci persona); and the man of lower rank is known for such whether he is called minor, inferior, humbler, or poor.

These two classes are referred to, however, in other connections. Greater respect is to be shown to the higher class; in II, 3. 4, nobiles personae may not be brought to trial by means of a mandate, that is, by another person authorized by the complainant, while this process may be used in the case of the ingenuus et pauper persona. One cause of the higher position of the upper class is indicated in II, 2. 8, where it is forbidden that anyone should procure the protection of a maior persona in a suit in order to oppress his adversary; this matter of patrocinium will be discussed later. The potentior is forbidden to bring suit against one not his own equal in such a way as to overawe the latter; if he has a suit with a pauper and does not wish to bring it himself before the court he must employ the services of one as weak as his adversary or weaker; the pauper, however, who brings suit against a potens may secure the services of one as powerful as his opponent (II, 3. 9).

The use of his position by the powerful man to interfere with the course of justice is indicated in several sections: in II, 2. 8, mentioned in the preceding paragraph, if the potens refuses to leave the court when ordered by the iudex he may be fined 2 pounds of gold; in II, 5. 4, parties to an agreement are to be bound by the penalty inserted in the document, unless it has been extorted by a more powerful person; in III, 6. 1, nobiles personae who cannot be made to obey the law by the iudex are to be remanded to the king; in VII, 1. 1, the same course is to be taken by the iudex who is hampered in doing justice by the defense or protection of a potens or by fear of the royal power (per alicuius *potentis defensionem aut patrocinio* seu metu regie potestatis).

We find, therefore, in the Lex Visigothorum a distinction between two classes of freemen of which the one is composed of the

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rich, powerful, and respected, and the other of the poor, weak, and humble. The real problem is to discover the nature of these two classes; that is, the underlying causes of the wealth and power of the higher class, on the one hand, and of the poverty and weakness of the lower class, on the other, and the reasons for this development in the Visigothic kingdom.[5]

The first part of our problem is to see what persons are included in this higher class; to translate this general class distinguished by wealth, rank, and power into terms of special classes found in the law.

The frequent occurrence of the term nobilis cannot be taken, it seems, to show that the old tribal noble of the Goths had survived as a class. It not infrequently has the meaning of distinguished birth and family, but not in the sense of a limited and exclusive class. This idea of family is seen in: V, 7. 17, ingenita libertas gratie dono fit nobilis; . . . generosa nobilitas, claritas generis; IV, 2. 22, Quicumque vir femina, sive nobilis seu inferior, where the fact that women are included among the noble class would indicate that the fundamental idea of the term was that of family.[6] But the term is also used in a general sense as meaning one of higher rank: VI, 1. 2, nobilitate vel dignitate palatini officii; nobilior vel potentior; II, 1. 7, ex nobilibus idoneisque, seu sit religiosus sive etiam laicus.

The higher officials of the palace evidently are to be included among the members of this higher class. The primates, primi palatii, are spoken of as the highest social class: III, 1. 5, quicumque ex palatii nostri primatibus vel senioribus gentis Gothorum; XII, 2. 15, nullus de religiosis cuiuscumque hordinis vel honoris seu de palatii mediocribus adque primis; VI, 1. 6, cum adsensu sacerdotum maiorumque palatii.[7] The influence of a position in the

[5] This distinction in regard to penalty between the richer and the poorer is common in the legal writings of the later Roman empire; see the references in Dahn, Könige, VI, p. 144, n. 7.

[6] This is even more apparent in the text of Walter, VI. 1. 2, where the sons of the primates palatii are included among the nobiles (nobiles potentioresque personae ut sunt primates palatii nostri eorumque filii), but this passage does not appear in the text of Zeumer.

[7] In Walter IX, 2. 9, the primates palatii are contrasted with the minores personae. This section is ascribed to Erwig, and therefore is not included in the text of Zeumer.

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palace is also seen in its effect upon the unfree servants: II, 4. 4: Servo penitus non credatur . . . excepto servi nostri . . . ut non immerito palatinis officiis liberaliter honorentur; id est: stabulariorum, gillionariorum, argentariorum coquorumque prepositi.

This higher position belongs also to the regular public officials of the chief administrative districts, the dux and comes. This is evidenced by VIII, 4. 29, where the comes civitatis pays the same fine as the honestioris loci persona, and is contrasted with the minor persona who pays a smaller fine and receives 50 blows.[8] If this be true of the comes it would of necessity be true of his superior officer, the dux.

In this higher class must have been included at least the upper clergy; the episcopus is regarded as being able to pay a fine of 50 solidi, while the lower ranks, "presbiter, diaconus, subdiaconus, clericus, vel monacus," are to pay the same fine as the laymen, *i. e.*, 5 solidi, and if they have not enough property to pay this they are to be punished by the bishop. From other references it appears that the sacerdotes in general enjoy especial favor in the eyes of the law which would entitle them to rank above the lower class; VI, 1. 6, cum adsensu sacerdotum maiorumque palatii; II, 1. 17, fretus honore sacerdotali; XII, 2. 15, nullus de religiosis cuiuscumque hordinis vel honoris seu de palatii mediocribus adque primis; their testimony is given an especial value: II, 5. 12: Scripta volumtas defuncti ante sex menses coram quolibet sacerdote vel testibus publicetur; IV, 3. 4: coram sacerdote vel iudice pupillo de cunctis rebus reddita ratione; V, 7. 9: presente sacerdote vel aliis duobus aut tribus testibus. This importance of the members of the clergy is in accord with the favored position of the church and the predominance of the eccleciastical spirit throughout the whole law.

[8] It is even more evident in Walter IX, 2. 9, which, as said in the preceding note, is a later law and not included in the edition of Zeumer. Here the contrast is between maioris loci persona, id est dux, comes sive etiam gardingi, and inferiores vilioresque personae, thiuphadi, omnisque exercitus compulsores vel hi qui compelluntur. Gardingi are mentioned also in Walter II, 1. 1, a law of Erwig not given by Zeumer; according to Dahn (Könige, VI, pp. 108 ff) gardingi is synonymous with palatini. Thiuphadi are the thousand-men, who are in charge of military áffairs within the districts of the comites; compulsores are apparently the subordinates of the thiuphadi, while "hi qui compelluntur" can mean only the freemen subject to military service. In regard to this distinction between the two classes of military officials, see Dahn, *l. c.*, p. 102.

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As has been shown already, the most common characteristic of the upper class was the possession of wealth. In many cases, doubtless, the member of this class possessed one or more of the advantages mentioned above, together with wealth; the combination in one person of noble birth, office of one sort or another, and large property was probably not infrequent. The higher officials would naturally, in this state of society, be possessed of large estates.

But there may well have existed a class of large landlords without office, even of inconspicuous origin. These it would seem are the persons understood by the term potentes, potentiores. The term itself, of course, is general; the "potestas" may be derived from wealth, office, or rank. But from its use in the law in general it appears that the term carries the special significance of power due to wealth. It seems to have that meaning in II, 3. 9, where the potens is contrasted with the pauper ("si potens cum pauperem causam habuerit").

The potens appears in the law as one who exercises patrocinium; in II, 2. 8, the potens is regarded as able to overawe "per illius patrocinium" the opponent of his protégé: Quicumque habens causam ad maiorem personam se propterea contulerit, ut in iudicio per illius patrocinium adversarium suum possit obprimere, ipsam causam . . . perdat; iudex autem, mox viderit *quemcumque potentem* in causam cuiuslibet *patrocinari,* liceat ei de iudicio eum habicere; in VII, 1. 1, "potentis defensio aut patrocinium" is regarded as a possible incentive for the iudex to pervert justice. The term patrocinium occurs frequently in the law, and everywhere has the meaning of the favor or protection of the strong toward the weak who depend upon them — generally toward freemen, occasionally toward their freedmen or slaves.

In several instances this patrocinium is supposed to be used to interfere with the course of justice: II, 2. 2, Quod si admonitus quisquam a iudicem fuerit, ut in causa taceat hac prestare causando patrocinium non presumat, et ausus ultra fuerit parti cuiuslibet patrocinare, etc.; II, 2. 8, quoted above; VII, 1. 1; VII, 4. 6, iudex criminosum non parcat pro patrocinio aut amicitia alicuius; in II, 1. 8, the iudex is regarded as exercising the patrocinium himself, to the perversion of justice.

But the term occurs in other connections, and in such a way as to make plain the nature of the relationship. V, 3 is entirely de-

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voted to this matter and deserves particular attention. The subject of the title is "De patronorum donationibus." Section 1 reads:

> Si quis ei, quem in patrocinio habuerit, arma dederit vel aliquid donaverit, aput ipsum que sunt donata permaneant. Si vero alium sibi patronum helegerit, habeat licentiam, cui se voluerit commendare; quoniam ingenuo homini non potest proibere, quia in sua potestate consistit; sed reddat omnia patrono, quem deseruit. . . . . Quicumque autem in patrocinio constitutus sub patrono aliquid adquisierit, medietas ex omnibus in patroni vel filiorum eius potestate consistat; alia vero medietatem idem buccellarius, qui adquisibit, obtineat; etc.

Here the one who exercises the patrocinium is called patronus, and the receiver of it is termed "is, quem in patrocinio habuerit" (elsewhere "qui in patrocinio est"), and later on in the section, buccellarius. In the Codex Euricianus in the Paris fragments, published in the first part of this edition, in the corresponding section (Cod. Eur. CCCX) the term buccellarius is used throughout for the dependent. The exact meaning and the derivation of this term are not certain,[9] but the substitution of the expression "ei quem in patrocinio habuerit" for buccellario in the Lex Visi. Recces. makes it clear that the term means here one dependent upon a patron. Section 4 shows more clearly the basis of this relationship:

> Ita ut supra premissum [*i. e.*, sec 1]: quicumque patronum suum reliquerit et ad alium se forte contulerit, ille, cui se commendaverit, det ei terram; nam patronus, quem reliquerit, et terram et que ei dedit obtineat.

Here the relation of patron and dependent is evidently founded on the holding of land of the patron on the part of the dependent. It would seem that the former law had specified arms as the particular gift of the patron to his follower, and the later compiler felt the necessity of making specific mention of land as the common basis of the relation. Another term for the man in the patrocinium of another is saio, in section 2:

> De armis, que dantur saionibus in patrocinio constitutis, et de adquisitionibus eorum.

[9] Dahn, Könige, VI, pp. 133 ff.

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> Arma, que saionibus pro obsequio donatur, nulla ratione a donatore repetantur; sed illa, que, dum saio est, adquisivit, in patroni potestate consistant.

Saiones are the regular subordinates of the iudices, and are used by the iudices to execute their judgments: II, 1. 24, De commodis adque damnis iudicis vel saionis. . . . Quid si ea que iudex ordinare decernit, saio callidus inplere neclexerit, etc.; II, 2. 4, Sepe neglegentia iudicum vel saionum, etc.; VI, 1. 4, coram iudice vel eius saione; X, 2. 5, Exemplar epistole informationis. Ille iudex illi saioni. Informamus te, ut, etc. But in the section quoted the saio seems to be in the patrocinium of a private patron; a similar private use of such officials seems to be meant in II, 1. 24, where saiones "qui *pro causis alienis* vadunt" are not to exact more than the tenth solidus for their services. It will be seen at once that this title suggests a state of society not essentially different from that of the later Merovingian kingdom in which the freemen are becoming dependent upon the great landlords either as tenants or as followers, vassi.

How complete was the dependence of the one in patrocinium is shown by VI, 5. 8: Quemcumque discipulum vel in patrocinio aut in servitio constitutum a magistro, patrono vel domino competenti et discreta disciplina percussum fortasse mori de flagella contingat, cum nihil ille, qui docet aut corripit, in hunc invidie aut malitie habuerit, qui cedit homicidio nec infamari poterit nec adfligi. This is even more apparent from VIII, 1. 1 and 3, where the general principle is declared that the patron is to be held liable for every crime which the one in patrocinium commits at his command:

> 1. Hoc principaliter generali sanctione censetur, ut omnis ingenuus adque etiam libertus aut servus, si quodcumque inlicitum iubente patrono vel domino suo fecisse cognoscitur, ad omnem satisfactionem compositionem patronus vel dominus obnoxii teneantur. Nam qui eius iussionibus obedientiam detulerunt, culpaviles haberi non poterunt, quare non suo excessu, sed maioris imperio id commisisse probantur.

So also in section 3 this principle appears: omnes, qui cum eo venerint vel qui fecerint, nominare cogatur, ut, *si in eius patrocinio*

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non sunt, unusquisque ingenuorum L flagella suscipiat; and in section 4: Ingenui autem huius criminis socii, *si in eius patrocinio non sunt,* centena flagella suscipiant, etc. This principle is referred to in VI, 4. 2: Si vero aliqui de ingenuis cum eo in eadem domo, non ab illo iussi neque in eius obsequio vel *patrocinio constituti,* unanimes tamen vel consentientes presumtori ingressi fuerint, unus quisque eorum simili damno et pene subiaceat. . . . Quod si *in patrocinio* vel obsequio . . . fuerint, . . . solus patronus ad omnem satisfactionem et pene et damni teneatur obnoxius.

The great distance between the two classes which is marked so frequently in the law is in large measure doubtless the result of this relationship. The many references to patrocinium and patronus, the fact that an entire title is devoted to the definition of the relations of the patron and the one in patrocinium, show how important this relationship had become in the eyes of the law. This relationship would account for the poverty and the comparative insignificance of the class known as inferiores, minores, pauperes. There may still have existed a class of free land-holders living upon their small alods, but it would appear that a large part of the freemen who had not been able to acquire the means to that higher consideration which the law accords to the possessors of wealth, office, or noble birth, had sunk into a position of dependents upon the great-landlords, either as tenants or personal followers. The early lawmakers had found it necessary to restrict the attempt of these landlords to reduce their free dependents to a condition of practical servitude by declaring that a freeman could not be forbidden to commend himself to any lord whom he chose (V, 3. 1, Antiqua. . . . habeat licentiam cui se voluerit commendare, quoniam ingenuo non poterit proibere, quia in sua potestate consistat). But the position of the one in patrocinio in practice was not very much above that of the libertus or even servus: V, 5. 8, discipulum vel *in patrocinio* aut *in servitio* constitutum; VI, 1. 4, servus qui debilitatus est (in tormentis) ingenuus in patrocinio domini sui permaneat; in V, 7. 18 the term is used in connection with libertus and in IV, 2. 7 and X, 2. 4 with servus.

It is familiar that just such a condition existed in the Roman empire in the period before the Germanic invasions. The growth of great estates in the hands of a comparatively small number of landlords, on the one hand, and the economic stress and the need of pro-

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tection, on the other, had produced a large body of dependent freemen who were in the patronage of the rich and powerful. The small holdings of independent farmers had almost entirely disappeared, and in their place were the great domains composed of land cultivated by slaves and farms held by free cultivators but owned by the landlords. In many cases such estates were practically independent little kingdoms. At the time of the invasions in certain regions the chief resistance to barbarians came from the owners of such domains leading a band of armed dependents. A considerable part of the land held thus by dependent tenants was composed of small holdings which the tenant had formerly owned, and had given up to the lord to receive back as precaria. Usually this was done because the former owner was deeply in the debt of the landlord, or was desirous of seeking his protection when public safeguards were inadequate, or found it impossible to support himself on his farm by reason of the heavy taxation.[10]

The very terms which are used in the Lex Visigothorum are taken from the Roman law. Patrocinium, se commendare, patronus are all to be found in the Codex Theodosianus. But in the Roman system this relationship was extra-legal. The law-writers recognize it only to forbid it. It is perhaps characteristic of the German law-givers, untrained in the niceties of legal distinctions and naïvely regarding as subject matter of law all institutions actually existing, that they should attempt to regulate so personal a relationship and to reduce to legal terms a matter so far outside the domain of strict law.

It is evident that this shows a much further development away from the primitive situation than had taken place among any other Germanic people at this time. The rapidity of this process is to be ascribed to the more complete absorption of the Roman system described above and to the development of Gothic society itself. No other Germanic kingdom had grown up on territory so completely Roman, except the Lombard state, and there the hostile relations of Lombards and Romans seem to have prevented an early Romanizing of that kingdom. The rash amalgamation of the Goths and Romans in the Visigothic kingdom is evidenced by the fact that this king-

[10] For description of this condition and references to the Roman sources, see Dahn, Könige, VI, pp. 88-100; Coulanges, Les Origines, "Le précaire romain," pp. 95-100, and "Le patronat chez les Romains," pp. 235-247.

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dom was the first to issue a territorial code. It is natural that the system of patronage so thoroughly developed in Roman Spain should have a great influence upon the new kingdom.

But the nature of the development of the Gothic state must be taken into account as well. The form of the settlement of the Visigoths upon the soil was that common in such cases — the practice known as hospitalitas, according to which the individual German freeman was given a portion of the estate of the individual Roman land-holder. Here as elsewhere the portion was known as the sors. In the Visigothic practice the portion of the Goth was two-thirds.[11] Here also, it would appear, the former imperial lands and the unclaimed lands in general fell to the king.

Thus there are present in a marked degree in the Gothic state all those features which have been recognized as working to the subversion of the free institutions and the democratic social condition of the primitive people in all the Germanic kingdoms. The existence of the relationship of dependent to patron as early as the reign of Eurich (461-485) is shown by titles CCCX and CCCXII of the Codex Euricianus, corresponding to Lex Visi, V, 3. 1, 2. The possession by the monarch of large domains, the creation of a powerful official class, both local and palatine, probably endowed with land from the royal estates, and the existence of a class of wealthy private landlords — these are the elements which in every tribal kingdom have developed a new nobility of wealth and office, threatening, on the one hand, the position of the ordinary freeman, and, on the other, the power and authority of the monarch.

This development was hastened by the internal struggles and disturbances which characterized the whole Visigothic history and which explains in great measure the easy conquest of the kingdom by the Saracens in 711. These struggles were due largely to the failure of a royal family that might have established a principle of succession and to the active hostility between the Catholic and the Arian churches. The former fact led to frequent contentions over the succession which were used by the nobles to strengthen their position at the expense of royal authority, while the latter added to the lawlessness and insecurity by reason of the mutual persecutions and reprisals.

[11] Lex Visig. X, 1. 8; Gaupp, Ansiedlungen, pp. 394–399.

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In conclusion, it may be said that the Visigothic law presents the picture of a society containing essentially those elements which in the Frankish empire grew into the feudal system of the Middle Ages. To what extent the officers had become feudalized cannot be determined, but these elements are certainly present: a state of government in which the public relation of the freeman to the state was of less importance than his private relation to his patron, and a separation of society into two main classes, of which the one was composed of the chief officials of the palace and of the local administration, the higher church officers, and the great landlords, and the other was made up of the ordinary freemen, many of whom were in a dependent relation to the wealthy land-owners, and all of whom were characterized by comparative poverty and insignificance. It cannot be supposed that a middle class was entirely lacking, but the two classes mentioned probably included the bulk of the population.

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CHAPTER V. THE BAVARIAN CODE.

Strictly considered, the Bavarian system does not come directly under the present study. There are no definite classes of minores or mediocres in the law, the only general distinction between classes of freemen being between freemen (liberi) and certain noble families mentioned by name. But the expression "minor" is used of freemen in three instances in the law, so that it seems necessary to discuss its meaning.

The Lex Baiuwariorum is the personal law of the tribe which constituted the duchy of Bavaria in the Merovingian kingdom. Opinions have varied greatly as to the time and manner of the editing of the law, but the latest view is that the code is the result of a single codification made between the years 743 and 748, Odilo being duke of Bavaria and Childerich III king of the Franks.[1] The code is evidently formed on the model of the Alemannian law, and shows evidence also of the use of the Visigothic code.

The Bavarian law recognizes no distinct class of inferior freemen. Where such a class appears it is regularly found in the wergeld classification, or, as in the Visigothic law, is effective throughout the law. In the Bavarian code the distinction in regard to wergeld refers to freemen with a wergeld of 160 solidi, five noble families with a wergeld of 320 solidi, the ducal family of the Agilolfings with a wergeld of 640 solidi, and the duke with a wergeld of 960 solidi. There is no general distinction between classes of freemen in the law, the ordinary subject of the law being the freemen.

There are, however, three cases where the term minor is used of freemen:

> II, 3: Si quis seditionem suscitaverit contra ducem suum, quod Baiuvarii carmulum dicunt: per quem inprimis fuerit levatum, conponat duci 600 solidos; alii homines, qui eum secuti sunt, illi similes, et consilium cum ipso habuerunt, unusquisque cum 200 solidos conponat; minor

[1] Brunner, RG., I, pp. 313-319; Schroeder, Lehrbuch, pp. 242 f. For the opposite view see Merkel in M. G. LL. folio, III, Lex Baiuw., praef.

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> populus, qui eum secuti sunt et liberi sunt, cum 40 solidis conponant ut tale scandalum non nascatur in provincia.
>
> II, 4: Si quis in exercitu, quem rex ordinaverit, vel dux de provincia illa, scandalum excitaverit infra propria hoste, et ibi homines mortui fuerint, conponat in publico 600 solidos. Et quis ibi aut percussiones aut plagas aut homicidium fecerit, conponat sicut in lege habet, unicuique secundum genealogiam. Et ille homo qui haec commisit, benignum inputet regem vel ducem suum, si ei vitam concesserint.
>
> De minoribus autem hominibus, si in hoste scandalum commiserint, in ducis sit potestate, quale poena sustineant.

Title VII, 3, is the same as Lex Alam. XXXIX. After giving the degrees of relationship within which marriage is proscribed and the penalty for violating the law, section 3 reads:

> Si minores personae sunt quae se inlicita coniunctione polluerunt, careant libertate, servis fiscalibus adgregentur.

These cases refer to freemen: in II, 3, "minor populus qui eum secuti sunt" are also "liberi;" in II, 4, "minores homines" appear to be the regular members of the army; in VII, 3, "minores personae" are to lose their freedom (careant libertate). The distinction, however, rests not upon a difference in classes of freemen, but upon the special circumstances governing each case. In II, 3, the scale of fines, 600 solidi, 200 solidi, 40 solidi, is graduated according to the degrees of guilt of 1) the originator of the revolt, 2) his chief confederates (qui eum secuti sunt, illi similes, et consilium cum ipso habuerunt), and 3) the crowd which followed. In II, 4, the difference in penalty is only apparent; "ille homo qui haec commisit" is equally in the power of the duke, for "he is to consider the king or the duke gracious if he spare his life." The particular mention of the minores homines seems to rest upon the supposition that they will be unable to pay the fine of 600 solidi and so in any case their punishment is left to the duke. In VII, 3, the distinction between "anyone" (quis), and minores personae is evidently based on the poverty of the latter, the confiscation of whose property would not be a sufficiently heavy penalty.

It is evident that the minores do not constitute a distinct class of freemen as they do in the Alemannian, Burgundian, and Lombard

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laws. It will be well, however, to consider briefly the condition of Bavarian society as shown in the law. One feature is particularly noteworthy, and that is the survival of the tribal noble. While the system in general is similar to that of the Frankish state, in the organization of the ducal administration with the count as the chief official and in the presence of freemen dependent upon the officials and territorial lords, five noble families beside the ducal Agilolfings have retained their favored position in the consideration of the tribe. This argues an unusual persistence of the feeling of tribal pride and continuity with the past, due perhaps to the long-continued existence of the tribe as a unit (the Marcomanni are recognized by Cæsar as a distinct tribe) and to their comparatively late entrance upon Roman soil and the consequent survival of more primitive institutions. The Marcomani under Marobod early in the first century A. D. moved into the inclosed region of modern Bohemia and dwelt there until the beginning of the sixth century, when they crossed the Danube and settled in the territory still known as Bavaria.[2]

The distinction made in regard to compensation for injury recognizes in general only three classes: freemen (title IV. De liberis, quomodo componantur), freedmen (title V. De liberis qui per manum dimissi sunt liberi, quod frilaz vocant, quomodo componantur), and slaves (title VI. De servis, quomodo componantur).

In respect to wergeld the following distinction occurs: Freemen with a wergeld of 160 solidi:

> IV, 28: Si quis liberum hominem occiderit, solvat parentibus suis, si habet, si autem non habet, solvat duci, vel cui commendatus fuit, dum vixit, bis 80 solidos, hoc sunt 160.

Five noble families with a double wergeld, 320 solidi:

> De genealogia qui vocantur huosi, drozza, fagana, hahilinga, aennion, isti sunt quasi primi post agilolfingos, qui sunt de genere ducali. Illis enim duplum honorem concedimus. Et sic duplam compositionem accipiant.

The ducal family of the Agilolfings, with a four-fold wergeld, 640 solidi:

[2] Zeuss, Die Deutschen, pp. 114-117, 364-380.

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Agilolfingi vero usque ad ducem in quadruplum componantur, quia summi principes sunt inter vos.

The duke with a six-fold wergeld, 960 solidi:

Dux vero sum 900 [960] solidis conponitur parentibus, aut regi, si parentes non habuerit.

The status of the freeman is very similar to that described in the Alemannian law. The freemen are regarded as regularly possessed of freeholds, but there are references also to dependent freemen. The freehold of the freeman is mentioned in the following instances:

In I, 1, evidently an adaptation of Lex Alam. I:

Ut si quis liber persona voluerit et dederit res suas ad ecclesiam pro redemptione animae suae, licentiam habeat de portione sua, postquam cum filiis suis partivit.

In II, 1:

Ut nullus liber Baiuvarius alodem aut vitam sine capitale crimine perdat; etc.

In VII, 4:

Ut nullum liberum sine mortali crimine liceat inservire nec de hereditate sua expellere: sed liberi qui iustis legibus deserviunt, sine impedimento hereditates suas possideant. Quamvis pauper sit, tamen libertatem suam non perdat, nec hereditatem suam. Nisi ex spontanea voluntate alicui tradere voluerit, hoc potestatem habeat faciendi.

Evidences that a part of the freemen stood in a dependent relation to the more powerful members of society are found in the following instances: in I, 1, part of which is quoted above: . . . posthac nullam habeat potestatem exinde quicquam auferre, nec ipse nec posteri eius, nisi defensor ecclesiae ipsius per beneficium praestare voluerit ei; in VII, 4: nisi ex spontanea voluntate alicui tradere voluerit; in IV, 28: solvat duci, vel cui commendatus fuit, dum vixit; in II, 14: Ut placita fiant per kalendas . . . et omnes liberi conveniant constitutis diebus. . . . Qui infra illum comitatum manent, sive regis vassus sive ducus, omnes ad placitum veniant.

The free Bavarians were, therefore, in part tenants of church and secular lands, and free servants and followers of the king, the

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duke, and other lords. It does not seem possible, however, to trace a definite connection between these dependent freemen and the minores mentioned in the three instances cited. It might be argued that the phrase "minor populus *qui eum secuti sunt* et liberi sunt" of II, 3, refers to the free followers of the leader of the revolt; that the leader stood to them in the relation of the overlord of IV, 28, "cui commendatus fuit." But the same expression, "qui eum secuti sunt," is used of the chief confederates of the leader, who are said to be of the same rank or importance as the latter (qui eum secuti sunt, illi similes), so that the term minor populus cannot be regarded as restricted in meaning to the personal followers of the leader. The fact that the minores homines of II, 4, would not be able to pay the fine of 600 solidi would probably be true of most of the ordinary freemen. Title VII, 3, in which minores personae are mentioned, has very slight value in the determination of classes in Bavarian society, and the use of the term in that instance is very vague in any event.

The qualities of comparative insignificance and comparative poverty which distinguish the minores would not belong to members of the noble families mentioned in the law; the minores may therefore be regarded as belonging to the class of ordinary freemen. More than this, however, cannot be safely concluded. In the Bavarian society of this time neither the dependent freemen nor the new nobility of land and office constituted a distinct class in the eyes of the law.

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CONCLUSION.

The importance of this study, if it has any, is in the field of the origins of feudal society. The classes of feudal society grew out of the mingled German and Roman peoples in Western Europe, brought together by the migrations and developing under the conditions of the period that followed. As far as the Germans are concerned, this meant a breaking down of the older classification of the tribal period and a rearrangement of society to meet the requirements of the new situation. The first stage of this process took place in the tribal kingdoms; accordingly, the classes appearing in the Germanic codes are intermediate between the classes of primitive German society and those of later feudal society. A general description of these classes as they appear throughout the German kingdoms whose laws have been studied in the foregoing pages, and a discussion of the forces of change and the way in which they operated, may throw some light on the general process of the development of feudalism.

The lowest class in every case is made up of the ordinary freemen. In all cases except that of the Burgundian kingdom these freemen have become in a greater or less degree dependent upon the land-holding and official classes. In the Burgundian law the minores are simple freemen, free land-owners, but distinguished from the owners of large estates, who form the mediocres. The distinction is due directly to the gift of lands by the king to his followers and supporters. In the Alemannian system the simple freemen, liberi, are contrasted with the medii on the basis of land-holding. The liberi are in part dependent tenants and followers, in part small land-owners. They are regarded as the lowest class, because of the development of a class of large land-owners, upon whom the freemen are in a measure dependent. The dependence of the freemen is to be attributed partly to a natural process, partly to the influence of a similar Frankish development. In the Bavarian law there is no class distinction between minores and mediocres, the class system resting upon the primitive distinction between noble and free, but the freemen occupy the same position as the Alemannian freemen and for the same causes. In the Lombard kingdom

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the "minimae personae" are simple freemen; they are distinguished as a class from the two sorts of royal officials who form the higher classes, so that their legal position is due directly to the development of the monarchy. But their economic position as partially dependent upon the landlords is to be ascribed to possession by the kings and the dukes of large tracts of land, from which developed the landholding class. In the Visigothic kingdom the minores, pauperes, owe their degradation almost entirely to the influence of the existing Roman society.

The mediocres and medii appear only in the Burgundian and Alemannian tribes. They are in both cases a class of landlords. In the Burgundian kingdom the mediocres are entirely the creation of the monarch, using his new-found wealth to build up a party of supporters. In the Alemannian duchy the medii are the great landlords, who have developed into a distinct class above the simple freemen, and upon whom the freemen are becoming dependent. The middle class of the Lombard system are the private officials of the king, gasindii regis, who owe their position and importance to the favor of the monarch.

The highest class in every case but the Bavarian is composed of the chief officials. In the Bavarian duchy the highest class in the wergeld scale is composed of the tribal nobles. In Alemannia the chief officials do not form a distinct class, but are drawn apparently from both the liberi and medii, and have a three-fold wergeld because of their connection with the duke. In the Burgundian kingdom the obtimates are the chief royal officials drawn from the landed class of the mediocres. The Lombard primi are the dukes, appointed by the king, but tending to become independent of him by reason of their own strength within their dukedoms. In the Visigothic kingdom the maiores, potentes, are the great officials and landlords, who owe their economic and social importance to the Visigothic society mostly to Roman influence, but partly also to their connection with the monarchical administration and to gifts of royal lands.

In general, the old division of society into freemen and tribal nobles has given way to a new division into a lower class composed of the ordinary subjects of the law, and a higher class composed of a new nobility of land and office. The higher class in some laws falls into two divisions, the landlord class as such, and the official

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class, including the higher officials of the royal service, in most cases probably drawn from the landlords. The lowest class moreover is not only inferior by comparison to the more privileged or powerful classes; it is in large measure economically dependent on them.

It is evident that the most important forces in this development were the creation of a royal administration, which replaced the older, more democratic system of government by popular assemblies and elected officials, and the acquisition of large land-holdings by one portion of the tribe, by those persons who were in a position to take advantage of the new situation.

The growth of royal power and the development of royal administration was a natural process. On the one hand there was need of more government, of a more elaborate system of control over individuals, in the new situation; on the other, the circumstances of the conquest and settlement gave the king who led the tribe during this protracted struggle greater powers than he had exercised in the tribal period. The other elements in the primitive system, tribal nobles and popular assemblies, were not in themselves suited to the task, nor, based as they were on tradition and custom, elastic enough to adapt themselves readily to new requirements. This work was to be undertaken by the king, inspired by personal ambition for power, and possessed of authority capable of extension over fields of activity in which at first the interference with tribal customs was not apparent. For the exercise of this new power the king created a royal administration, in many cases modelled on the Roman system, but composed in the main of persons related to him already in his private capacity, the stewards and other private officials of the royal household, the royal companions, and the managers of the scattered royal possessions. This system was bound to grow in importance and in authority with the growth of the monarchy, and to absorb the jurisdiction of the older tribal system. The popular assemblies and elected officials lose their importance and come under the control of royal officials. This meant for the freemen a loss in political importance, an exclusion from a share in the government, and for the tribal nobles the loss of their favored position in the state, which now depended on relation to the monarch and was taken by the new official class.

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In the Alemannian and Bavarian duchies the authority of the dukes, successors to the tribal kings, developed under Frankish influence. At the time of the appearance of these codes both of the tribes had for two centuries been under the rule of the Franks, although at this time the dukes were practically independent within their duchies. In the Alemannian duchy the duke governed by means of the counts and their subordinates (missi). The free institutions persisted in the general assembly (conventio populi) and in the hundred court (conventus in omni centena), in which the elected hundred-man had a place and which all the freemen were required to attend, but even here the authority of the count or his missus was superior to that of the hundred-man. There is no evidence of the existence of tribal nobles, and the chief officials of the duke are given the three-fold wergeld corresponding to that of the Frankish antrustio.

The Bavarian ducal administration is very simliar to that of Alemannia; the regular administrative districts are the counties, governed by the counts. There is a suggestion that the old tribal assembly retained at least a memory of its former function of electing the ruler of the tribe: II, 1: Si quis contra ducem suum, quem rex ordinavit in provincia illa, aut *populus sibi elegerit ducem,* etc. There is no evidence of the existence of a territorial division into hundreds; the centuriones and decani are simply military officers of the count. The "placitum" which all freemen are required to attend is held apparently in each county, and the presiding officer is the iudex appointed by the count. The striking feature of the Bavarian law is the persistence of the tribal nobles, of whom five families are mentioned by name as having special honor and higher wergeld. There is no indication that the members of the ducal administration were given a higher wergeld.

In the Burgundian kingdom the royal administration has completely replaced the former system. The king and his chief officials (obtimates) edit the code and prepare new decrees; there is one reference to a "conventus Burgundionum" (Const. Extr. XXI) which probably refers rather to the royal council than to a general assembly of the tribe. The government is administered centrally by the officers of the royal court and locally by the appointed counts (comites civitatum aut pagorum) and their subordinates (militantes). There are no instruments of local self-government; no

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territorial hundreds, and accordingly no hundred courts or hundred-men. The tribal noble has completely disappeared, and the highest class in the scale of wergelds is made up of the chief officials (obtimates).

In the Lombard kingdom the royal administration has completely superseded the free institutions of government. The king and his chief officials frame the laws. There are references to the participation of the people in the acceptance of the laws, but such participation is evidently merely formal. There is no evidence of the existence of territorial hundreds, or of free assemblies and elected officials of any sort. The peculiarity of the Lombard administration is the carrying out of the dual system of royal officials. The public administration is in the hands of the dukes and their subordinates, sculdahis, decani, and saltarii, all appointed officials. The private royal officials (gasindii regis) are those of the king's court and the managers of the royal domains. There is evidence of a conflict between these two sets of officials, the dukes representing the separatist tendencies of their districts, and the gasindii the central authority. But, though these dukes appear to be the descendants of former elected officials and are in opposition to the peculiarly royal system, yet the political importance of the freemen does not seem to derive any benefit from them. The tribal nobles have disappeared as a class, the highest class consisting of the dukes and the second of the gasindii regis.

In the Visigothic kingdom the Roman principles of law have dominated. The king is in theory the absolute source of authority, ruling by his officials, dukes, counts, and their subordinates. In fact the power of the king is generally greatly restricted by the growth of a powerful class comprising the great officials and wealthy landlords who have largely usurped the functions of the monarch. The weakness of the king does not redound to the advantage of the freemen, however, for they are thus subject to the more disastrous tyranny of the local lords.

As a result of the permanent settlement of the tribe within definite boundaries, greater importance became attached to the possession of land. The most obvious features of the economic situation were the development of a new nobility of land and office, and the economic dependence of the lower class on this landed aristocracy. The public and private domains of the Roman emperors, and also

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the waste and unoccupied lands, were assumed by the monarch. In general this land was used to furnish the larger revenues required by the king, and to enrich the royal officials and supporters. The mass of freemen suffered, not only relatively by the comparison of their small holdings to the larger estates of the favored portion of the tribe, but also actually by the loss of means of expansion to accommodate increase in population. The increasing hardships of life due to greater needs in a more elaborate form of society and to heavier public burdens, and the loss of political power which left them at the mercy of the more powerful, are the sufficient causes of the sinking of the freemen into dependence on the larger landowners.

The best example of the use of royal lands to create a monarchical system and a monarchical party is seen in the Burgundian kingdom. Here the beneficiaries of the king, those who have received lands from his "munificence" (ex munificentia nostra), form a distinct portion of the population, separate from and superior to the ordinary freemen. They compose the two higher classes in the scale of wergelds, the middle class comprising the holders of estates from the royal domains in general, the highest classes the chief royal officials chosen from such landlords. The ordinary freemen, who, as hospites, live upon lands taken from the Roman land-owners, make up the lowest class. This distinction between the large estates and the "sortes" of the freemen reacted invidiously upon the position of the freemen, so that they were known in the law as "minores," "inferiores," but at the early date of the appearance of the Burgundian code (the end of the fifth century) it had not resulted in making the freeholders dependent upon the landlords.

In the Alemannian duchy the development was somewhat different. The great estates had come into existence not entirely from the gifts of the Alemannian duke. The invasion of the territory of the later Alemannian duchy had been undertaken by a confederation of tribes known as Alemanni under several kings. As a result of this invasion, which was practically accomplished early in the fifth century, there had come into existence a considerable number of large landlords, consisting of the several kings and their beneficiaries, and perhaps the tribal nobles, as well. During the three centuries that had intervened between the invasion and the appearance of the Alemannian law (*ca.* 400-700) these possessors of estates larger than the

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ordinary freeholds had developed into a distinct class of landlords. This class was doubtless largely augmented by the practice of the Alemannian duke of giving out lands to his followers after the Frankish custom. The members of this class were known as medii (mediani in the Pactus), and possessed a higher wergeld than the ordinary freemen. The natural course of such a development is seen in Alemannian law in the fact that the freemen in part had ceased to be land-owners and had become dependent upon these landlords, as retainers and tenants. The freemen in general, both dependent and independent, formed the lowest class in the law, known as liberi (minoflidi in the Pactus).

In Bavaria the development resembles in the main that which we have just described as taking place in the Alemannian duchy, in that the Frankish custom of bestowing land upon the officials had been used by the duke to create a royal administration, and that the freemen are in part free land-owners and in part dependent followers and tenants of the landlords. But the persistence of the tribal nobles as the highest class in the wergeld system prevented the distinction based upon land-holding from appearing in the law.

In the Lombard kingdom the development of great estates from the imperial land follows a course differing quite noticeably from that in the other kingdoms. The dukes, who were apparently great landlords, owed their wealth not so much to gifts from the king as to their own efforts. The conquest of Italy from the Romans was largely the work of the individual dukes in their own districts, especially during the ten years' interregnum which occurred shortly after the invasion. In the course of this conquest the dukes acquired a great deal of land by force and by oppression of the Roman landlords. At the end of the interregnum, Paulus tells us, the dukes gave up half of their possessions to the re-established monarchy, but they seem to have kept enough to make them powerful within their dukedoms. This fact, as much as anything probably, accounts for the independent attitude of the dukes toward the king throughout the whole history of the Lombard kingdom. The management of the royal lands in the various dukedoms led to the creation of a special set of officials, gastaldii, who were directly dependent upon the king and probably received land from him. The class system is not based, however, upon a distinction in land holding; the lowest class comprises all the regular freemen, whether land-

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owners or dependent tenants and retainers; the two highest classes are made up of the two sorts of officials.

In the Visigothic kingdom the acquisition by the king of the imperial lands had very little effect upon the class system as it appears in the Visigothic law, owing to the predominance of the Roman system. At the time of the invasion Roman law recognized a distinction between two classes of freemen, rich and poor. This was based upon an actual division of the Roman population into great landlords and dependent cultivators. The Visigoths, unable to overthrow this system, gradually conformed to it. Those of the Visigothic race who by their own efforts or by the favor of the king acquired great estates became members of the higher class, potentes, maiores, nobiles; those who were not able to gain a share in these advantages sank to the position of the submerged Roman freemen and became dependent in the main upon the rich; these were minores, pauperes, viliores. The distinction is based upon land-holding, but it is a distinction borrowed from the Roman law, and due to the influence of Roman custom.

The growth of the feudal society of the Middle Age out of the simple structure of the Germanic tribes was a natural and progressive development, resulting from the establishment of the German barbarians upon Roman territory and the consequent mingling of German and Roman elements. The character of the primitive German society was not adequate to the new situation, not elastic enough to take advantage of the higher civilization. It was the part of the tribal kingdoms to break down this crude and rigid structure and to replace it with one more fitted to do the work required. In doing this, however, the germs of a new order were planted by the creation of a class of great landlords upon whom the ordinary subjects tended to become economically dependent. It was the work of the Frankish kingdom and empire to develop this partial dependence into complete subjection and to create a state in which the personal relation of vassal to overlord and tenant to landlord was the basis of government. The part of the tribal kingdoms in this process is shown most clearly in those tribal laws in which the classes of population have received relative names indicating their importance to society under the new conditions. These laws have been examined to determine as far as possible the precise nature of such classes and the attempt has been made in this conclusion to show how the different elements of the new situation worked to bring about these classes.

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